

83-1052

No. _____

Office-Supreme Court, U.S.
FILED

DEC 20 1983

ALEXANDER STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM R. PHILLIPS,

Petitioner,

—against—

HAROLD J. SMITH, Superintendent, Attica
Correctional Facility,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

WILLIAM M. KUNTSLER
Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003
(212) 674-3303

Attorney for Petitioner

Question Presented

Does the "cause-and-prejudice" test of Wainwright v. Sykes, 433 U.S. 72 (1977) apply when a state court adjudicates the merits of a constitutional claim but also holds, in the alternative, that the claim is barred because of a procedural default?

Parties

William R. Phillips and Harold J. Smith, as Superintendent of Attica Correctional Facility.

Table of Contents

Question Presented . . . . .	.1
Parties. . . . .	.1
Table of Contents . . . . .	.3
Table of Authorities . . . . .	.5
Opinions Below . . . . .	.8
Jurisdictional Statement . . . . .	.9
Constitutional Provisions and Statutes Involved . . . . .	.9
Statement of the Case . . . . .	.10
Reasons for Granting the Writ . . . . .	.23
I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER THE "CAUSE-AND-PREJUDICE TEST APPLIES TO ALTERNATIVE STATE COURT HOLDINGS . . . . .	.23
II. THE SECOND CIRCUIT'S DECISION IN <u>PHILLIPS V. SMITH</u> VIOLATES THE PRINCIPLES SET FORTH IN <u>WAINWRIGHT V. SYKES</u> . . . . .	.28
Conclusion . . . . .	.35
<u>APPENDIX</u>	
A. Opinion of the Court of Appeals for the Second Circuit in <u>Phillips v. Smith</u> , 717 F. 2d 44 (2d Cir. 1983). . . . .	.19

- B. Opinion of the United States District Court for the Southern District of New York, Gagliardi, D.J., in Phillips v. Smith, 552 F. Supp. 653 (S.D.N.Y. 1982) 19a
- C. Opinion of the Supreme Court of the State of New York, Lang, J., in People v. Phillips, No. 1370/72 (slip op. 1979) . . 36a
- D. Opinion of the Supreme Court of the State of New York, Lang, J., in People v. Phillips, 97 Misc. 2d 665, 412 N.Y.S. 2d 94 (Sup. Ct. 1979) 40a
- E. Order of the Court of Appeals for the Second Circuit denying rehearing and refusing suggestion of rehearing en banc in Phillips v. Smith, No. 82-2375 50a
- F. Affidavit of Michael F. Armstrong 52a
- G. Affidavit of Whitney North Seymour, Jr. 55a
- H. Affidavit of Edward M. Shaw . . 58a
- I. Relevant portions of the trial transcript in People v. Phillips, aff'd 52 A.D. 2d 758, 384 N.Y.S. 2d 715 (1976), leave to appeal denied 39 N.Y. 2d 949, 352 N.E. 2d 894, 386 N.Y.S. 2d 1039 (1976). 60a
- J. New York Daily News, November 15, 1974, p. 44 81a

Table of Authorities

	<u>page</u>
<u>Bradford v. Stone,</u> 594 F. 2d 1294 (9th Cir. 1979) . . .	.26
<u>County Court of Ulster Co. v. Allen,</u> 442 U.S. 140 (1979) . . . . .	.28
<u>Darden v. Wainwright,</u> 699 F. 2d 1031 (11th Cir. 1983) . .	.25
<u>Dietz v. Solem,</u> 640 F. 2d 126 (8th Cir. 1981) . .	.27
<u>Engle v. Isaac,</u> 456 U.S. 101 (1982) . . . . .	.28,29
<u>Hockenbury v. Sowders,</u> 620 F. 2d 111 (6th Cir. 1980), <u>cert. denied</u> 450 U.S. 933 (1981). .	.27
<u>Lowery v. Estelle,</u> 696 F. 2d 333 (5th Cir. 1983) . .	.25
<u>New Jersey v. Portash,</u> 440 U.S. 450 (1978) . . . . .	.20
<u>People v. Phillips,</u> 39 N.Y. 2d 949, 386 N.Y.S. 2d 1039 (1976) . . . .	.18
<u>People v. Phillips,</u> 52 A.D. 2d 758, 384 N.Y.S. 2d 715 (1st Dept. 1976). .	.18
<u>People v. Phillips,</u> No. 1370/72 (slip op.) (S. Ct. N.Y. Cty. 1979) . . . . .	.8,20
<u>People v. Phillips,</u> 97 Misc. 2d 665, 412 N.Y.S. 2d 94 (S.Ct. N.Y. Cty. 1979) . . . . .	.8,20

<u>People v. Phillips,</u>	
87 Misc. 2d 613, 384 N.Y.S. 2d 906	
(S. Ct. N.Y. Cty. 1975)	18
<u>Phillips v. Smith,</u>	
717 F. 2d 44 (2d Cir. 1983) . .	.8,22,26
<u>Phillips v. Smith,</u>	
632 F. 2d 1019 (2d Cir. 1980) .	.8,21
<u>Phillips v. Smith,</u>	
552 F. Supp. 653 (S.D.N.Y. 1982).	21
<u>Phillips v. Smith,</u>	
485 F. Supp. 1365 (S.D.N.Y. 1980).	30
<u>Ramirez v. Jones,</u>	
683 F. 2d 712 (2d Cir. 1982),	
cert. denied __U.S.__, 103 S. Ct.	
1260 (1983)	30 .
<u>Rogers v. McMullen,</u>	
673 F. 2d 1185 (11th Cir. 1982),	
cert. denied __U.S.__, 103 S. Ct.	
740 (1983)	25
<u>Smith v. Phillips,</u>	
455 U.S. 209 (1982)	21
<u>Thompson v. Estelle,</u>	
642 F. 2d 996 (5th Cir. 1981) . .	23

<u>Thompson v. State,</u> 537 S.W. 2d 732 (Tex. Crim. App. (1976)	24
<u>Ulster County Court v. Allen,</u> 442 U.S. 140 (1979)	29
<u>United States ex rel. Caruso v.</u> <u>Zelinsky,</u> 689 F. 2d 435 (3d Cir. 1982)	26,27,30
<u>United States ex rel. Veal v.</u> <u>DeRobertis,</u> 693 F. 2d 642 (7th Cir 1982)	26
<u>United States v. Frady,</u> 456 U.S. 152 (1982)	28
<u>Wainwright v. Sykes,</u> 433 U.S. 72 (1977)	et passim

Statutes

28 U.S.C. §2254 (1976)	9
New York Criminal Procedure Law, §440.10 (1976)	18
<u>Other Authorities</u>	

<u>New York Daily News, November</u> 15, 1974, p. 44	16
---	----

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit in Phillips v. Smith, is reported at 717 F. 2d 44, and reprinted in full at Appendix A. The opinion of the United States District Court for the Southern District of New York, Gagliardi, J., in Phillips v. Smith, is reported at 552 F. Supp. 653 and reprinted in full at Appendix B. The opinion of the Supreme Court of the State of New York, Lang, J., in People v. Phillips, No. 1370/72 (slip op. 1979), unreported, is reprinted in full at Appendix C. The opinion of the Supreme Court of the State of New York, Lang, J., in People v. Phillips, is reported at 97 Misc. 2d 665 and 412 N.Y.S. 2d 94 and reprinted in full at Appendix D.

Jurisdictional Statement

The judgment of the Court of Appeals for the Second Circuit was entered on September 2, 1983. Rehearing was denied and petitioner's suggestion of rehearing in banc was refused on October 18, 1983. This petition for a writ of certiorari was filed within 90 days of October 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §2254(1).

Constitutional Provisions and
Statutes Involved

1. The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

No person...shall be compelled in any criminal case to be a witness against himself...

2. The Fourteenth Amendment to the Constitution provides, in pertinent part:

No State shall...deprive any person of life, liberty, or property, without due process of law...

3. 28 U.S.C. §2254 provides, in

pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Statement of the Case

In May, 1971, agents of the Commission to Investigate Allegations of Police Corruption and New York City's Anti-Corruption Procedures (popularly known as the "Knapp Commission") observed petitioner, then a New York City police officer, accepting money from a known prostitute. When confronted with evidence of his actions, he agreed (1) to provide the Knapp Commission with information about police corruption; (2) to testify at public hearings; and (3) to work as an undercover agent. Petitioner made this agreement in return for full

transactional immunity for all matters which he might disclose to the Commission. Immunity was granted by Whitney North Seymour, Jr., then United States Attorney for the Southern District of New York. App. G at 56a.

Petitioner worked as an agent of the Knapp Commission for approximately five months. He participated in sixty-nine (69) undercover operations, resulting in the indictment of thirty-one (31) persons, including corrupt police officers and members of organized crime.

In November, 1971, petitioner appeared on television to give public testimony before the Knapp Commission. Among the millions of viewers was Detective John Justy, assigned to the New York County District Attorney's Office. Petitioner reminded Detective Justy of a composite sketch that he had seen almost three years earlier. The sketch

purportedly depicted the man who had murdered a pimp named Jimmy Smith and a prostitute named Sharan Stango, and attempted to murder one of Stango's customers, Charles Gonzalez, on December 24, 1968. The killer had never been apprehended, and the case had been closed. After watching petitioner on television, Justy re-opened the murder investigation.

On March 29, 1972, petitioner was indicted for the Smith/Stango murders, and for the attempted murder of Gonzalez. The indictments ended his undercover work for the Knapp Commission and aborted the prosecutions initiated by his undercover work.

Petitioner then contacted the United States Attorney's Office to inquire about the status of his immunity. He was specifically informed by Messrs. Rudolph Giuliani, Robert Lawrence, and Edward M.

Shaw¹ that he had been given no immunity with respect to his Knapp Commission testimony. Petitioner later received a letter to this effect from Mr. Shaw. (App. H at 58a).

His first trial commenced on June 28, 1972, and the prosecution did not use any immunized testimony against him. On August 9, 1972, a mistrial was declared, with the jury voting 10-2 for acquittal.

At some point, presumably between the two trials, the prosecution obtained a tape recording of petitioner's conversations with Mr. Armstrong. The tape was made in connection with petitioner's work for the Knapp Commission, and was, therefore, fully covered by the grant of immunity. The

¹All then Assistant United States Attorneys, Mr. Giuliani is now the United States Attorney for the Southern District of New York.

tape detailed several instances of corrupt police activity, including petitioner's prior illegal relationship with one of the murder victims, Jimmy Smith. On the tape, petitioner described his illegal relationship with Smith as lasting until 1968. The prosecution never informed defense counsel of the existence of this tape, nor of their intention to introduce it at trial.

Petitioner's second trial commenced on September 16, 1974, before Justice Harold Birns. An integral part of his defense was that his illegal relationship with Smith had ended at the close of the 1965 football season, and that he never again visited Smith nor extorted any more money from him (App. I at 60a-61a). During cross-examination, the prosecutor carefully "set up" petitioner's direct testimony, asking, "You most emphatically and categorically deny that you ever

visited Jimmy Smith in any of the houses of prostitution after 1965?" to which question he replied in the affirmative. (App. I. at 65a-66a.) On three occasions, the prosecutor asked him if he had Smith "on the pad,"² and three times he denied it. (App. I at 67a-68a.) The prosecutor then emphasized the importance of this issue. "The issue of whether or not you put Jimmy Smith on the pad is very important to the outcome of this trial, do you understand that, sir?" he asked petitioner, who agreed. (App. I at 71a-73a.) This question was repeated twice. Id. Then the prosecutor asked, "You understand, do you not, that if Jimmy Smith were on the pad, that is

²"On the pad" is a street term used to describe "an illegal contract whereby a police officer is being paid regularly by a man for protection from arrest." (App. I at 71a.)

supposedly paying you off regularly by the month, that would give you reason for visiting him regularly over an extended period of time?" (App. I at 73a.)

The prosecutor then prepared to impeach petitioner by asking whether he had ever told anyone that Smith was on the pad, whether he had "told a soul," whether he had told Armstrong, whether he was sure, and whether he was as sure of that as he was of the rest of his testimony. (App. I. at 75a-77a.) Shortly thereafter, this line of questioning was repeated, but in more detail, including direct quotes from the tape. (App. I at 78a-80a.) Twice more, petitioner was asked if he had told Armstrong that Smith was on the pad, and twice again he denied it. (App. I at 77a-80a.) The immunized tape was then played before the jury. As one news report described it, "Phillips sat quietly, pale and motionless. . .

[while the] jury listened intently and followed the taped conversation with a printed transcript." (App. J at 82a.)

Not only did this evidence destroy a part of petitioner's defense that both the prosecution and the defense thought to be crucial, but it branded him as a perjurer in the eyes of the jury. His entire testimony, spanning four days and covering one thousand pages of transcript, was totally discredited.

On November 24, 1974, the jury returned a verdict of guilty on all three counts. Shortly thereafter, the defense moved to vacate the verdict on the ground that one of the jurors, while serving as such, had applied for and actively sought a job with the District Attorney's Office. This information had been withheld by the prosecution until after the trial. Following an evidentiary hearing, Justice Birns denied the motion,

People v. Phillips, 87 Misc. 2d 613, 384 N.Y.S. 2d 906 (S.Ct. N.Y. Cty. 1975), and, on January 28, 1975, petitioner was sentenced to concurrent prison terms of 25 years to life and 20 years to life for the murders and 8 1/3 to 25 years for the attempted murder. The Appellate Division affirmed, without opinion, People v. Phillips, 52 A.D. 2d 758, 384 N.Y.S. 2d 715 (1st Dept. 1976) (mem.), and the Court of Appeals subsequently denied leave to appeal, People v. Phillips, 39 N.Y. 2d 949, 386 N.Y.S. 2d 1039 (1976).

Petitioner then moved pro se, pursuant to New York Crim. Proc. Law §440.10 (McKinney, 1976), to vacate his convictions on the ground, inter alia, that the use of the immunized tape violated his Fifth and Fourteenth Amendment rights. Justice Lang of the State Supreme Court adjudicated the

merits of the constitutional claim,
holding:

It is also clear that the United States Attorney did not have the power to grant defendant immunity from State prosecution. The Federal immunity statute in effect during the time of the supposed agreements between Mr. Armstrong and Mr. Seymour permitted a United States Attorney to grant only use or testimonial immunity, not transactional immunity (U.S. Code, Title 18, §§6002, 6003). Nor is anything more required by the United States Constitution (Kastigar v. United States, 406 U.S. 441). And while a grant of immunity by Federal authorities is binding upon the States, the latter cannot be bound to give any greater degree of immunities than the Federal authorities themselves can give (see Murphy v. Waterfront Commission, 378 U.S. 52).

* * *

In any event, with regard to the tape recording which the defendant claims was used illegally by the prosecution, the court notes that it was used to impeach the defendants' testimony when he took the stand and was identified by the defendant as being his voice. Such evidence, even if it was obtained by the prosecution through unconstitutional means, is admissible for impeachment purposes, on the theory that constitutional rights should not be used to protect a defendant from the

consequences of blatant perjury.
(Walder v. United States, 347 U.S.
62; Harris v. New York, 401 U.S.
222).

People v. Phillips, 97 Misc. 2d 665, 667,
668, 412 N.Y.S. 2d 94, 95, 96 (S.Ct. N.Y.
Co. 1979). Justice Lang also held, in
the alternative, that Phillips' claim was
untimely, as it should have been raised
at trial. Id. at 668-69, 412 N.Y.S. 2d
at 95-96. Leave to appeal was denied.

Petitioner then moved for reargument
in light of this Court's decision in New
Jersey v. Portash, 440 U.S. 450 (1978).
On reargument, Justice Lang abandoned his
earlier analysis of the substantive
constitutional claim, finding instead
that the use of the immunized testimony
"was harmless beyond a reasonable doubt."
Justice Lang also reiterated his earlier
finding that the claim was untimely.
People v. Phillips, No. 1370-72 (S.Ct.
N.Y. Cty. Jan. 3, 1979). (App. C at).

Petitioner then filed the instant Petition for Writ of Habeas Corpus on April 5, 1979. As earlier stated, on March 30, 1980, District Judge Pierce conditionally granted the writ, based on implied juror bias, without reaching the immunity issue. Phillips v. Smith, 485 F. Supp. 1365 (S.D.N.Y. 1980). The Second Circuit affirmed, 632 F. 2d 1019 (2d Cir. 1980), and the Supreme Court subsequently reversed, Smith v. Phillips, 455 U.S. 209 (1982), remanding the petition for consideration of the immunity claim.

On remand, the court below held that the procedural default rule of Wainwright v. Sykes, 433 U.S. 72 (1977) is applicable when a state court both adjudicates the merits of a constitutional claim, and also finds a procedural default. Phillips v. Smith, 552 F. Supp. 653 (S.D.N.Y. 1983). It also held that petitioner failed to show

adequate "cause" for his procedural default, Id. The petition was dismissed and the Court of Appeals for the Second Circuit affirmed. 717 F. 2d 44 (2d Cir. 1983).

Reasons for Granting the Writ

- I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER THE "CAUSE-AND-PREJUDICE" TEST APPLIES TO ALTERNATIVE STATE COURT HOLDINGS.
-

The Courts of Appeals are seriously divided over whether the "cause-and-prejudice" test of Wainwright v. Sykes applies when a state court reaches the merits of the constitutional claim, but also holds, in the alternative, that the claim is barred by a procedural default.

The Courts of Appeals for the Fifth, Ninth and Eleventh Circuits have adopted a "bright-line" rule, holding that a state court's adjudication on the merits, whether standing alone or in the alternative, is sufficient to withdraw the case from the ambit of Sykes. In Thompson v. Estelle, 642 F. 2d 996, 998 (5th Cir. 1981), the Court of Appeals for the Fifth Circuit held:

Wainwright v. Sykes does not preclude federal habeas review of a petitioner's constitutional claim if the state court adjudicates the claim on the merits [citations omitted]. Although Thompson failed to make a contemporaneous objection to the admission of his prior federal conviction, the Texas Court of Criminal Appeals reached the merits of his claim. See Thompson v. State, 537 S.W. 2d at 736. The state trial court then considered the merits of Thompson's claim a second time when he applied for state habeas corpus relief. Because the state courts have not relied exclusively upon Thompson's procedural default, Wainwright v. Sykes does not prevent federal habeas review.

(emphasis added). In Thompson, the state court thoroughly discussed the procedural default, and then dismissed the substance of the claim in a single sentence.

Thompson v. State, 537 S.W. 2d 732, 735-36 (Tex. Crim. App. 1976).

Nonetheless, this was sufficient to place the constitutional claim before the federal court. Accord, Lowery v. Estelle, 696 F. 2d 333, 342 n. 28 (5th Cir. 1983). Similarly, in Rogers v.

McMullen, 673 F. 2d 1185, 1188 (11th Cir. 1982), the Eleventh Circuit, faced with an alternative holding by a state court, held that "[b]ecause the Florida Supreme Court reached the constitutional issue, we are not foreclosed from addressing the merits by Wainwright v. Sykes." Accord, Darden v. Wainwright, 699 F. 2d 1031, 1034 (11th Cir. 1983); Rogers v. McMullen, 673 F. 2d 1185, 1188 (11th Cir. 1982), cert. denied, __U.S.__, 103 S. Ct. 740 (1983). The Ninth Circuit has also declined to impose the Sykes bar where the state court reached the merits and also found a procedural default, holding:

The absence of any demonstrated 'cause for this failure to comply with the California contemporaneous objection rule might bar review of petitioner's federal constitutional claim in this proceeding [citing Sykes], were it not for the fact that the state courts did not rely solely upon the procedural default in ruling of petitioner's direct appeal. On appeal, the California District Court of Appeals denied relief on alternative grounds: that petitioner failed to object or

request a curative instruction; and that the error, 'if any,' was not prejudicial in view of the evidence against petitioner. (The California Supreme Court stated no reasons for denying review.) Although the intermediate state court did not pass unequivocally on the merits of the federal claim, we have chosen to assume the state's failure to rest exclusively upon the procedural default permits us to reach the federal question.

Bradford v. Stone, 594 F. 2d 1294, 1296 n. 2 (9th Cir. 1979) (emphasis added).

On the other hand, the Courts of Appeals for the Second, Third and Seventh Circuits have taken the opposite approach, holding that Sykes applies whenever the state courts state that a claim is barred due to a procedural default. Phillips v. Smith, 717 F. 2d 44 (2d Cir. 1983); United States ex rel. Veal v. DeRobertis, 693 F. 2d 642, 650 (7th Cir. 1982); United States ex rel. Caruso v. Zelinsky, 689 F. 2d 435, 440 (3d Cir. 1982).

The Courts of Appeals for the Sixth and Eighth Circuits have staked out an intermediate position applying the procedural default rule of Wainwright v. Sykes only where the state court relied primarily on the procedural ground. See, e.g., Dietz v. Solem, 640 F. 2d 126, 131-32 and n. 1 (8th Cir. 1981); Hockenbury v. Sowders, 620 F. 2d 111, 115 (6th Cir. 1980), cert. denied 450 U.S. 933 (1981).

It is respectfully submitted that the divisions within the Courts of Appeals raise serious questions for the proper administration of justice, and certiorari should be granted in order to establish uniform guidelines for federal habeas corpus relief.

II. THE SECOND CIRCUIT'S DECISION
IN PHILLIPS V. SMITH VIOLATES
THE PRINCIPLES SET FORTH IN
WAINWRIGHT V. SYKES

In determining the scope of
Wainwright v. Sykes, this Court has
always looked to the principle of comity,
finality, accuracy, and trial integrity
which underlie that decision. See, Engle
v. Isaac, 456 U.S. 107 (1982); United
States v. Frady, 456 U.S. 152 (1982);
County Court of Ulster County v. Allen,
442 U.S. 140 (1979). The importance
assigned to each of these factors,
however, should be no greater than that
assigned to them by the state courts.
Consequently, when a state court
adjudicates the merits of the
constitutional claim, despite the
existence of a procedural default, the
federal court may also reach the merits
without first invoking the
"cause-and-prejudice" test. See, e.g.,
County Court of Ulster County v. Allen,

442 U.S. 140 (1979). Such a result strikes the proper balance between state interests and the vindication of a defendant's constitutional rights.

The same result should obtain when a state court fails to give its procedural default rule preclusive effect by adjudicating the merits of the constitutional claim. A bright-line rule, requiring a state court to rely exclusively on the procedural default, will protect state interests to the extent that the states themselves want that protection.

Concern over comity--federal respect for state procedural rules--was the most important factor informing this Court's decision in Sykes. See, e.g., Engle v. Isaac, 456 U.S. 107 (1982); Ulster County Court v. Allen, 442 U.S. 140 (1979). When a state court does not give its procedural rules preclusive effect, and

instead goes on to adjudicate the claim on the merits, a federal court does not denigrate state procedures by doing likewise. Perhaps the importance of the constitutional question will cause a state court to reach the merits of the claim while attempting to honor the state procedural default rule in the breach. Cf. Ramirez v. Jones, 683 F. 2d 712, 718 (Leval, D.J., concurring) (2d Cir. 1982), cert. denied __U.S.__, 103 S. Ct. 1260 (1983). Whether the state legislature should countenance a state court's failure to enforce state procedural rules is not a matter for federal concern. When a state court reaches the merits of the constitutional claim it invites federal scrutiny and obviates federal concerns over comity.³

³In Caruso, the Court of Appeals for
(Footnote Continued)

The exclusivity rule also protects trial integrity, accuracy, and finality to the extent that the states themselves feel in need of that protection.

Whatever the frequency of "sandbagging," the state's interest in preserving the integrity of its judicial system can be speedily vindicated by an exclusive holding on the procedural default.

(Footnote Continued)

the Third Circuit suggested that "[t]here may be occasions when the state courts believe that the interests of justice are better served by denying [petitioner's] arguments for both procedural and substantive reasons." 689 F. 2d at 440.

The Caruso Court intimated that such decisions seem "fairer" than those decided solely on procedural grounds. 689 F. 2d at 440. One might properly question the degree of solace given to a hapless defendant, who, in the interests of "fairness," is given a decision on the merits which is both wrong and wholly unreviewable through habeas corpus. In any event, the state courts are still free to be fair by adding a decision on the merits to a decision based on the procedural default--the "exclusivity" rule simply requires that the substantive decision be a correct one.

Denying a claim solely on procedural grounds would send a clearer message to prospective "sandbaggers" than that conveyed by alternative state court holdings. Conversely, a state court's decision to review the merits can only mean that it does not feel its integrity is imperiled. As to finality, the state court could have ended this litigation in January, 1979, by holding that the immunity claim was barred on the basis of the procedural default, thereby vindicating the principle of finality. The state court had a second opportunity to put an end to the litigation when petitioner moved for a rehearing. Again, the state court reached the merits of the claim. If the earlier holding on the procedural default was truly intended to be preclusive, the motion would have been denied peremptorily. Plainly, the state court considered the interests served by

finality to be subservient to those served by resolution of the constitutional question. The same can be said of accuracy. A state court's adjudication on the merits, when exclusive reliance on the procedural default would have extinguished the claim, can mean only that the state court was less concerned with accuracy than with the substance of the constitutional question.

The "exclusivity" rule is also consistent with the terms of Wainwright v. Sykes. The Sykes Court implied that any state adjudication on the merits would permit a federal court similarly to consider the substantive constitutional claim, without first inquiring into cause and prejudice. The Sykes Court commented that:

The area of controversy which has developed [about state procedural bars] has concerned the reviewability of federal claims

which the state court has declined to pass on because not presented in the manner prescribed by [state procedures] . . .

433 U.S. at 81-82 (emphasis added). The Court specifically limited the applicability of the cause-and-prejudice test to "contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them as required by state procedure." Id. at 87 (emphasis in original). Consequently, contentions of federal law which were resolved on the merits are not subject to Wainwright v. Sykes.

Conclusion

Given the deep divisions within the federal courts, and the need to properly balance a defendant's rights against state interests, certiorari should be granted to resolve this important question of federal law.

Respectfully submitted,*

WILLIAM M. KUNSTLER
Center for Constitutional
Rights
853 Broadway
New York, N.Y. 10003
(212) 674-3303

Attorney for Petitioner

Dated: New York, N.Y.
December 19, 1983

* Counsel wishes to express his appreciation for the enormous contributions of Ronald Kuby, a graduate of the Cornell University School of Law, and Joan L. Washington, legal worker with the Center for Constitutional Rights, in the preparation of this petition.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



No. 1199—August Term, 1982

(Argued June 9, 1983 Decided September 2, 1983)

Docket No. 82-2375



WILLAM R. PHILLIPS,

Petitioner-Appellant,

—v.—

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent-Appellee.



Before:

OAKES and MESKILL, *Circuit Judges*,
and HILL,* *District Judge.*



Appeal from an order of the United States District
Court for the Southern District of New York, Gagliardi,

* Honorable Irving Hill, United States District Judge for the Central District of California, sitting by designation.

J., dismissing William R. Phillips' petition for a writ of habeas corpus based on the procedural default rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977). Affirmed.

WILLIAM M. KUNSTLER, Center for Constitutional Rights, New York, New York (Mark B. Gombiner, Center for Constitutional Rights, New York, New York, of counsel), *for Appellant*.

ROBERT M. PITLER, Assistant District Attorney, New York County, New York, New York (Robert M. Morgenthau, District Attorney for New York County, David H. Steiner, Assistant District Attorney, New York County, New York, New York, of counsel), *for Appellee*.

MESKILL, *Circuit Judge*:

In 1974 William R. Phillips was tried and convicted in New York State Supreme Court of two counts of murder and one count of attempted murder. In 1978 he moved to vacate the judgment in state court alleging that his Fifth and Sixth Amendment rights were violated by the admission at trial of allegedly immunized testimony. The state judge denied his motion ruling alternatively that Phillips' claim of immunity was not timely made and that, in any event, the error was harmless. The United States District Court for the Southern District of New York, Gagliardi,

J., denied habeas relief based on the procedural default rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977). *Phillips v. Smith*, 552 F.Supp. 653 (S.D.N.Y. 1982).

Affirmed.

BACKGROUND

William R. Phillips was a New York City police officer when, in 1971, he agreed to cooperate with the Knapp Commission's investigation into police corruption. In return, the United States Attorney for the Southern District of New York allegedly agreed to grant Phillips full transactional immunity for all matters which he might disclose. Later that year Phillips testified at televised hearings conducted by the Commission. A detective watching those hearings noted a resemblance between Phillips and composite sketches of a suspect in the 1968 murders of Jimmy Smith, a pimp and bookmaker, and Sharon Stango, a prostitute. Soon thereafter, several of Smith's ex-prostitutes and customers identified Phillips as having been acquainted with Smith. Among them was Charles Gonzalez, an eyewitness to the Smith/Stango murders who had also been shot by the suspect.

Phillips was charged by a New York County grand jury with the Smith/Stango murders and the attempted murder of Gonzalez. His first trial in 1972 ended in a hung jury, 10-2 for acquittal. His second trial began in 1974 in the New York State Supreme Court. During the nine week trial, several witnesses testified that Phillips had been extorting money from Smith for many years prior to 1968 and that shortly before the murders Phillips had threatened to "blow Smith's . . . head off" if he did not pay him \$1,000. Gonzalez identified Phillips as the man who shot him, Smith and Stango.

Phillips took the stand, denied having committed the murders and offered an alibi defense. He insisted that he had not extorted money from Smith or visited him since the close of the 1965 college football season. On cross-examination, the government introduced a tape recording made in connection with the Knapp Commission investigation in which Phillips admitted to extorting \$100 monthly from Smith after 1965. The defense objected on the ground that it had not been afforded a prior opportunity to hear the entire tape. The court admitted the recorded testimony, but ruled that the defense could challenge the integrity of the recording. The jury found Phillips guilty of the Smith/Stango murders and the attempted murder of Gonzalez.

Phillips moved to vacate the verdict on the ground of jury bias because one of the jurors had a job application pending with the District Attorney's office. This motion was denied and Phillips was sentenced to concurrent terms of 20 and 25 years to life for the murders and 8-1/3 to 25 years for the attempted murder, *People v. Phillips*, 87 Misc.2d 613, 384 N.Y.S.2d 906 (Sup. Ct. 1975). The Appellate Division affirmed without opinion, *People v. Phillips*, 52 A.D.2d 758, 384 N.Y.S.2d 715 (1976), and leave to appeal to the Court of Appeals was denied, *People v. Phillips*, 39 N.Y.2d 949, 386 N.Y.S.2d 1039, 352 N.E.2d 894 (1976).

Two years later, in 1978, Phillips moved in state court pursuant to N.Y. Crim. Proc. Law § 440.10 (McKinney 1971) to vacate his conviction claiming, for the first time, that his recorded testimony introduced at the second trial was covered by transactional immunity allegedly granted by the United States Attorney in connection with the Knapp Commission investigation. The state court denied the motion because Phillips had failed to timely raise his

immunity claim in accordance with the New York Criminal Procedure Law. Even if his claim had been timely raised, the court questioned whether a United States Attorney could lawfully immunize Phillips from state prosecution and noted that, in any event, the recording was lawfully used for impeachment purposes. *People v. Phillips*, 97 Misc.2d 665, 412 N.Y.S.2d 94 (Sup. Ct. 1979). Leave to appeal was denied. On Phillips' motion for reargument, the court held:

This Court denied [Phillips'] motion to vacate on the grounds that his claims of immunity were not timely raised. The court also held, *as an alternative ground*, that even if defendant had been granted immunity, his recorded testimony was admissible because it was used to impeach him when he took the stand at trial.

Since this court's decision, the Supreme Court of the United States has held, in *State of New Jersey v. Portash*, [440 U.S. 450 (1978)] that testimony for which a grant of use immunity is given cannot subsequently be [used] to impeach a witness at trial. Defendant now moves for reargument of his motion to vacate on the grounds that the *Portash* decision invalidates this court's denial of his motion.

Defendant's motion to reargue is granted, to the extent that this court acknowledges that the *Portash* decision prohibits immunized testimony from being used to impeach a witness at trial. *However, the major thrust of this court's decision in its denial of defendant's motion to vacate was that the defendant's claims of immunity were not timely made.* This holding is unaffected by *Portash*. The court therefore adheres to its original order denying defen-

dant's motion to vacate. *Moreover, the court finds that given the evidence of defendant's guilt, the use of his recorded testimony was harmless error beyond a reasonable doubt.*

Br. of Appellee, App. at 2-3 (emphasis added).

Phillips then filed this petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. Judge Pierce granted the writ on the ground of juror bias; *Phillips v. Smith*, 485 F.Supp. 1365 (S.D.N.Y. 1980), but he did not reach the immunity issue. We affirmed, 632 F.2d 1019 (2d Cir. 1980), but the Supreme Court reversed and remanded for consideration of Phillips' immunity claim. *Smith v. Phillips*, 455 U.S. 209 (1982).

On remand, Judge Gagliardi found that Phillips had forfeited federal habeas review of his immunity claim due to his procedural default. *Phillips v. Smith*, 552 F.Supp. 653, 656-57 (S.D.N.Y. 1982). Finding that Phillips had failed to show cause for his failure to timely raise his immunity claim, Judge Gagliardi denied the petition. Phillips brings this appeal.

DISCUSSION

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Supreme Court held that a defendant who fails to comply with state rules of procedure governing the timely presentation of federal constitutional claims forfeits his right to federal habeas review of those claims unless he can show "cause for the noncompliance [with state procedure] and some showing of actual prejudice resulting from the alleged constitutional violation." *Id.* at 84. Since *Wainwright v. Sykes*, many federal habeas courts have

grappled with the procedural default rule. Where the state court has held that the petitioner forfeited his federal constitutional claim due to a procedural default, the cause and prejudice analysis plainly applies. *Engle v. Isaac*, 456 U.S. 107, 124-29 (1982). However, where the state court does not rely on a procedural default but instead reaches and decides the merits of a federal constitutional claim, federal habeas review is available without having to show cause and prejudice. See, e.g., *Klein v. Harris*, 667 F.2d 274, 285-86 (2d Cir. 1981); *Thomas v. Blackburn*, 623 F.2d 383, 386 (5th Cir. 1980), *cert. denied*, 450 U.S. 953 (1981).

In this case, the state court held that Phillips had forfeited his constitutional immunity claim because it had not been timely raised. But, the state court also rejected Phillips' immunity claim on its merits. The state court held in the alternative. Phillips argues that where the state court reaches the merits of a federal constitutional claim despite a procedural default, the cause and prejudice test of *Wainwright v. Sykes* does not apply. The state responds that an alternative procedural holding provides an adequate and independent state ground for decision having the same preclusive effect under *Wainwright v. Sykes* as a procedural holding that stands alone. Thus, the issue presented is whether a federal habeas court must apply the cause and prejudice analysis where the state court denied post-judgment relief relying alternatively on procedural grounds and on the merits of the federal constitutional claim. This question is one of first impression in this Circuit although it has been addressed in other circuits with divided results.

On one side of the question are the Fifth, Ninth and Eleventh Circuits. Each of these courts believes that *Wainwright v. Sykes* does not bar federal habeas review

of federal constitutional claims unless the state court relied exclusively or solely on the petitioner's procedural default. *See, e.g., Darden v. Wainwright*, 699 F.2d 1031, 1034 (11th Cir. 1983); *Lowery v. Estelle*, 696 F.2d 333, 342 n.28 (5th Cir. 1983); *Rogers v. McMullen*, 673 F.2d 1185, 1188 (11th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3509 (U.S. Jan. 10, 1983); *Thompson v. Estelle*, 642 F.2d 996, 998 (5th Cir. 1981); *Bradford v. Stone*, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979); *see also* Bagwell, *Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits*, 95 F.R.D. 435, 457 & n.138 (1982) ("If there has been a failure to comply with a state procedural rule but the state elects to consider the federal claim on the merits *anyway*, the federal court in the later habeas case will also reach the merits").

On the other side of the question are the Third and Seventh Circuits which hold that the cause and prejudice analysis applies whenever the state court expressly relied on an adequate and independent state procedural ground. *See, e.g., United States ex rel. Veal v. DeRobertis*, 693 F.2d 642, 650 (7th Cir. 1982); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982). The Sixth and Eighth Circuits employ a more flexible standard, applying the procedural default rule of *Wainwright v. Sykes* only where the state court relied primarily on the procedural ground. *See, e.g., Dietz v. Solem*, 640 F.2d 126, 131-32 & n.1 (8th Cir. 1981); *Hockenbury v. Sowders*, 620 F.2d 111, 115 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

The district court found most persuasive the Third Circuit's decision in *United States ex rel. Caruso v. Zelinsky*, which held that "state court reliance on a procedural rule as an alternate holding suffices to implicate the procedural default doctrine." 689 F.2d at 440.

Judge Gagliardi reasoned that despite the state court's discussion of the merits of Phillips' immunity claim, a procedural default is a procedural default no matter what language surrounds it and the principles underlying the *Wainwright v. Sykes* cause and prejudice analysis require that a federal court give effect to state court judgments that rest on adequate and independent state procedural grounds.

We agree and hold that explicit state court reliance on a procedural default bars federal habeas review of the forfeited claim absent a showing of cause and prejudice regardless of whether the state court ruled alternatively on the merits of the forfeited claim. We adopt this rule because it (1) is more consistent with the policies underlying the procedural default rule of *Wainwright v. Sykes*; (2) is more consistent with the greater weight of courts of appeals decisions; (3) is more consistent with related decisions of this Court and the Supreme Court; and (4) is more logical than the rule advanced by Phillips.

Because the circuits are divided and because there is no controlling precedent from the Supreme Court or from this Court, our inquiry begins with the policies underlying the procedural default rule of *Wainwright v. Sykes*. See *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 441-42 (3d Cir. 1982); *Forman v. Smith*, 633 F.2d 634, 639 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). In *Sykes*, the Supreme Court was concerned with comity. Acknowledging the "well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts," 433 U.S. at 81, the Court reasoned that state procedural rules designed to ensure error-free state adjudication are desirable and should be respected by the federal courts, *id.* at 90. The Supreme Court was also

concerned with finality. It recognized that if federal courts were free to review the federal constitutional claims of state defendants despite a procedural default, "defense lawyers . . . may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.* at 89. The Court also recognized that by giving effect to state procedural rules designed to preserve the trial as "a decisive and portentous event," the procedural default standard helped to ensure the integrity of the trial and the accuracy of the verdict. *Id.* at 90. The Court adopted the cause and prejudice exception to safeguard against a miscarriage of justice. *Id.* at 91.

Both Phillips and the state argue that their position will best advance the goals of comity, finality, accuracy and trial integrity. Phillips contends that comity does not require a federal habeas court to give effect to a state procedural rule if the state court fails to do so. In his view, if the state court elects to address the merits of a defendant's federal constitutional claim despite his procedural default, a federal habeas court can do likewise without disrespect for comity. This is because when a state court *invites* federal intervention by ruling on the merits of federal constitutional issues despite a procedural default, it manifests a judgment that the state's interest in resolving the constitutional question outweighs its interest in finality, accuracy and trial integrity.

The state, of course, interprets *Wainwright v. Sykes* differently. In its view, the goals of finality, accuracy and trial integrity are best served when state courts are free to dispose of all issues without having to fear federal habeas intervention. The state argues that an alternative disposi-

tion on the merits does not undermine the validity, adequacy or independence of the procedural ground.

We believe that the state is correct. Comity requires that federal courts respect state procedural rules to the extent those rules do not unjustly extinguish rights guaranteed by the federal Constitution. *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."). Thus, if the state court relied on an adequate and independent state procedural ground, federal habeas review is unavailable absent a showing of cause and prejudice. The same respect is due when the state court rules alternatively on the merits. We need not worry that state courts will sacrifice federal constitutional rights under the guise of a procedural default because the cause and prejudice test allows for federal habeas review, despite a procedural default, to prevent a fundamental miscarriage of justice.

The rule advanced by Phillips also runs counter to the goals of finality, accuracy and trial integrity. He asks that we ignore the effect of his noncompliance with New York procedural law because the state court reached the merits of his immunity claim. The state court did not ignore his procedural default, but rather stated explicitly that Phillips had forfeited his immunity claim. With this holding, the state court fully and finally disposed of the issue and clearly demonstrated the importance it attaches to the goals of finality, accuracy and trial integrity. We will not penalize the state court for addressing the merits in the alternative, particularly when it may have done so in order to provide an alternative basis for affirmance in the event the procedural ruling is reversed. Rather than encouraging adjudication of all issues in as few proceedings

as possible, Phillips' position would prolong and fragment the full and final disposition of state criminal cases. See *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 442 (3d Cir. 1982). We will not abet this result.

It is for these same reasons that a majority of courts of appeals addressing this issue have concluded that the cause and prejudice analysis applies whenever the state court relied on a procedural default. See *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642, 650 (7th Cir. 1982); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982); *Dietz v. Solem*, 640 F.2d 126, 131-32 & n.1 (8th Cir. 1981); *Hockenbury v. Sowders*, 620 F.2d 111, 115 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981). A careful and persuasive analysis of the question at bar is the Third Circuit's decision in *United States ex rel. Caruso v. Zelinsky*. There the state appellate court denied post-conviction relief both on the merits and on procedural grounds. Its opinion did not indicate the primary basis of the decision: "Despite the procedural bars to the bringing of this petition, we have nevertheless elected to consider this appeal on the merits and we are satisfied that each of the substantive issues raised is clearly without merit." 689 F.2d at 439. The district court granted habeas relief, but the Third Circuit reversed. Writing for the court, Chief Judge Seitz noted that "an alternate holding has the same force as a single holding; it is binding precedent." Consequently, "state court reliance on a procedural rule as an alternate holding suffices to implicate the procedural default doctrine." *Id.* at 440. The district court relied on Chief Judge Seitz's analysis; so do we.

Although the Fifth, Eleventh and Ninth Circuits support Phillips' position, we find their opinions to be less persuasive. The Ninth Circuit in *Bradford v. Stone*, 594 F.2d 1294 (9th Cir. 1979), chose "to assume [that] the

state's failure to rest exclusively upon procedural default permits us to reach the federal question." *Id.* at 1296 n.2 (emphasis added). The Eleventh Circuit¹ in *Darden v. Wainwright*, 699 F.2d 1031 (11th Cir. 1983), noted that the state court decision under review had as its "primary basis" a ruling on the merits; the state court's one paragraph discussion of the procedural default followed a multi-page analysis of the merits. *Id.* at 1034 n.4. We recognize that the Fifth Circuit's decision in *Thompson v. Estelle*, 642 F.2d 996 (1981), squarely supports Phillips' position that a state court must rely *exclusively* on a procedural default to preclude federal habeas review under *Wainwright v. Sykes*. See *Lowery v. Estelle*, 696 F.2d 333, 342 n.28 (5th Cir. 1983). But, for the reasons detailed in this opinion we reject the Fifth Circuit's holding.

The state court in this case denied Phillips' application for post-judgment relief primarily because he had failed to timely raise his immunity claim. *Cf. Hearn v. Mintzes*, 708 F.2d 1072, 1076 (6th Cir. 1983) (federal courts must "discern and accept the foundation for state decisions when that foundation is apparent in the state judgment"). In his original opinion and his opinion on reargument, Justice Lang of the New York Supreme Court expressly held that Phillips had forfeited his immunity claim and in his latter opinion he emphasized that the "major thrust of

¹ The Eleventh Circuit was not free to consider the question at bar as one of first impression. In *Rogers v. McMullen*, 673 F.2d 1185 (1982), cert. denied, 51 U.S.L.W. 3509 (U.S. Jan. 10, 1983), the court deemed itself bound by the Fifth Circuit's decision in *Thompson v. Estelle*, 642 F.2d 996 (1981) (federal habeas review available unless state court relied solely on procedural default), because in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted "as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981." *Rogers v. McMullen*, 673 F.2d at 1188 n.4.

this court's decision . . . was that the defendant's claims of immunity were not timely made." Br. of Appellee, App. at 2. The adequacy, independence and primacy of the state court's holding on procedural grounds is "apparent from the four corners of the opinion." *Michigan v. Long*, 51 U.S.L.W. 5231, 5233-34 (U.S. July 6, 1983).² We will not interfere.

Even if Judge Lang had not expressly stated that the "major thrust" of his decision was Phillips' procedural default, our decision would be the same. The Supreme Court in *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979), and this Court in *Martinez v. Harris*, 675 F.2d 51, *cert. denied*, 51 U.S.L.W. 3256 (U.S. Oct. 4,

² In an analogous context, the Supreme Court will decline to review a state court decision that rests on adequate and independent state grounds. "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of [the] Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 51 U.S.L.W. 5231, 5234 (U.S. July 6, 1983). In *Michigan v. Long*, the Supreme Court considered whether it had jurisdiction to review a state court decision which "referred twice to the state constitution . . . , but otherwise relied exclusively on federal law." *Id.* at 5233. The Court stated that:

[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 5234. But, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.*

Our inquiry in this case is similar to the question before the Court in *Michigan v. Long* and we are guided by the Court's analysis in that case. Since Judge Lang clearly and expressly based his decision primarily on Phillips' failure to timely raise his immunity claim, we find that the state court's decision rested on an adequate and independent state procedural ground.

1982), have indicated without deciding that federal habeas courts should search for and respect state adjudications of procedural default. In *Ulster County*, the Supreme Court embarked on a lengthy examination of the record and New York law to ascertain the basis of an ambiguous state court decision denying post-verdict relief. The Court engaged in this analysis even though the state court explicitly, albeit summarily, decided the federal constitutional claim on the merits and even though it was unclear that a procedural default was involved. *Id.* at 147-54. Although the Supreme Court concluded that the state court had decided on the merits, its decision in *Ulster County* suggests that federal habeas courts should avoid entertaining claims that have been forfeited under state law. In *Martinez v. Harris*, we held that where a state court affirms a conviction without opinion, its decision rests on an adequate state procedural ground if the state had argued both meritorious procedural and substantive grounds for affirmance. Our decision to presume that silence by a state court evinces an intent to rely on an adequate state procedural ground reflects respect for state procedural rules designed to require contemporaneous objections. There is no reason for us to pay less respect to state rules of procedure where the state court *explicitly* holds that a federal constitutional claim is barred by a state procedural rule. See *County Court of Ulster County v. Allen*, 442 U.S. at 154.

We recognize the appeal of Phillips' position. He advocates a bright-line test—if the state court addresses the federal question, its decision is open to federal review. However, the appeal sours when the implications are considered. The Third Circuit recognized in *United States ex rel. Caruso v. Zelinsky* that “[t]here may be occasions when the state courts believe that the interests of justice

are better served by denying the [petitioner's] arguments for both procedural and substantive reasons." 689 F.2d at 440. However, if state court decisions on the merits of federal constitutional claims are automatically subject to federal habeas review despite an independent and adequate state procedural ground for affirmance, state courts will surely hesitate before evaluating those claims. Because the state court explicitly held that Phillips forfeited his federal constitutional immunity claim due to his failure to comply with state procedural rules, federal habeas review is unavailable unless Phillips can demonstrate cause for his procedural default and prejudice resulting from the alleged constitutional violation.

From our examination of the record, we are satisfied that Phillips has failed to show cause for not timely raising his immunity claim. Phillips contends that because neither he nor his attorneys knew during the second trial that his recorded testimony was covered by a grant of immunity, his failure to object to the admission of that testimony should be excused for cause. In addition, Phillips argues cause in that three Assistant United States Attorneys allegedly told him after his involvement with the Commission had ended that he had not been granted immunity when, in fact, he had. The district court ruled without an evidentiary hearing that Phillips had failed to demonstrate cause because "on the basis of petitioner's own submissions both here and in the state courts, . . . petitioner had knowledge of at least a colorable claim of immunity prior to the commencement of his trial." *Phillips v. Smith*, 552 F.Supp. 653, 656-57 (S.D.N.Y. 1982).

We cannot reconcile Phillips' argument that he lacked sufficient knowledge to inform his counsel of the immunity claim with his own sworn statements establishing just the opposite. Phillips swore in an affidavit accompanying

his motion to vacate that he had been advised while working with the Knapp Commission of an agreement between its chief counsel and the United States Attorney for the Southern District of New York under which Phillips was to receive full immunity in exchange for his assistance. In addition, Phillips averred that he agreed to have his testimony recorded "with the understanding that he had full immunity for any and all statements made concerning his past illegal activities." Michael F. Armstrong, former Chief Counsel of the Knapp Commission, submitted an affidavit accompanying Phillips' motion in which he states that Phillips' cooperation was obtained "on the condition that he would be afforded immunity for matters which he described to the Commission." App. of Appellant at 24. On the basis of these statements, the state court found, the district court agreed and so do we that "long prior to his indictment, the defendant was aware that he had, at least, a colorable claim of immunity." 97 Misc.2d 665, 667, *quoted in*, 552 F.Supp. at 656.

Phillips' additional argument for cause is similarly unavailing. He contends that he failed to raise his immunity claim at trial because three former Assistant United States Attorneys had told him prior to trial that he did not have an immunity claim. Assuming the truth of this allegation,³ these circumstances do not establish cause for his failure to timely raise the claim because Phillips was aware, despite the alleged misrepresentations, that he had been promised immunity. Because Phillips knew that he had been promised immunity, he has not established cause for his failure to timely raise that claim.

³ The only evidence offered in support of this allegation is a letter dated two years *after* Phillips' trial from one of the former Assistant United States Attorneys connected with the Knapp Commission investigation in which he advises Phillips that "whatever your immunity status, these tapes would be admissible [sic]." App. of Appellant at 35.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL F. ARMSTRONG, being duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of New York and a member of the firm of Barrett Smith Schapiro Simon & Armstrong, 26 Broadway, New York, New York 10004.

2. From July 1970 through December 1972, I served as Chief Counsel for the Commission to Investigate Allegations of Police Corruption and New York City's Anti-Corruption Procedures, a citizens' commission charged with the task of investigating police corruption in the New York City Police Department. The Commission, known as the "Knapp Commission" after its chairman, Whitman Knapp, was created by Mayor John Lindsay's Executive Order No. 11, dated May 21, 1970 (attached hereto as Exhibit 1) and City Council Local Law No. 13, enacted May 27, 1970 (attached hereto as Exhibit 2). The Mayor acted in response to a letter, dated May 14, 1970, from a committee headed by Corporation Counsel J. Lee Rankin, which had been appointed to look into specific charges of police corruption made in the public press (a copy of this letter is attached as Exhibit 3).

3. In or about May 1971, Commission agents conducted an investigation of police corruption on the East Side of Manhattan, which led to officer William R. Phillips. Mr. Phillips, a patrolman assigned to the 25th Precinct in upper East Side Manhattan, was observed, recorded and photographed in the commission of several corrupt acts involving accepting money from an East Side prostitute.

4. When confronted with the evidence of his actions, Mr. Phillips agreed to give the Commission information

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

WILLIAM R. PHILLIPS,

Petitioner,

79 Civ.1782

-against-

MEMORANDUM
DECISION

HAROLD J. SMITH, Super-
intendent, Attica
Correctional Facility,

Respondent.

-----x

GAGLIARDI, D.J.

This is a petition for a writ of
habeas corpus pursuant to 28 U.S.C.
§2254. Petitioner William Phillips, a
former New York City police officer, was
convicted on November 21, 1974 of two
counts of murder and one count of
attempted murder after a jury trial in
New York State Supreme Court, New York

County.¹ The convictions were affirmed without opinion by the Appellate Division, People v. Phillips, 52 A.D. 2d 758 (1st Dept. 1976), and leave to appeal to the Court of Appeals was denied, 39 N.Y. 2d 949 (1976). Petitioner subsequently filed a motion to vacate the judgment in New York State Supreme Court pursuant to N.Y. Crim. Proc. Law §440.10. Justice Irving Lang denied the motion on January 3, 1979, and leave to appeal to the Appellate Division was denied on February 15, 1979. On reargument, Justice Lang again declined to vacate the judgment of conviction.

On April 5, 1979, petitioner filed the instant petition attacking his convictions on the following grounds: (1) that he was denied his constitutional

¹A prior trial ended in a hung jury in August, 1972.

right to due process in that facts which were known to the prosecution but undisclosed to petitioner purportedly established that two of the jurors were biased; and (2) that the trial court improperly admitted a tape recording of petitioner's allegedly immunized statements to the chief counsel to the Knapp Commission on police corruption. The petition was granted by Judge Pierce, who did not reach the immunity issue, on the ground that one of the jurors was impliedly biased. 485 F. Supp. 1365 (S.D.N.Y. 1980). The Court of Appeals affirmed Judge Pierce's decision, 632 F. 2d 1019 (2d Cir. 1980), but the Supreme Court reversed and reinstated the judgment of conviction, 455 U.S. 209 (1982). The case has now been remanded to this Court for consideration of petitioner's immunity claim.

Petitioner was a New York City police officer assigned to the 25th Precinct in Manhattan. According to Michael Armstrong, the chief counsel to the Knapp Commission on police corruption, petitioner agreed in 1971 to work as an undercover agent for the Commission and to provide information on police corruption to the Commission in exchange for a grant of immunity. Sometime during the summer of 1971, Armstrong recorded a conversation with petitioner in which petitioner recounted many of his corrupt activities, including his involvement with a pimp and bookmaker named Jimmy Smith who had been murdered in 1968. Petitioner stated in that conversation that he had extorted approximately \$1,500 from Smith, and then had put Smith "on the pad" for \$100 a month, i.e., Smith was forced to pay

petitioner \$100 per month to avoid being arrested for his illegal activities.

Petitioner was indicted in March, 1972 for the murders of Smith and a prostitute named Sharon Stango, and for the attempted murder of a Mr. Charles Gonzalez. At trial, petitioner testified that he had extorted \$1,500 from Smith in 1965, but never received regular payments from Smith thereafter. The prosecutor subsequently introduced petitioner's taped conversation with Armstrong which directly contradicted petitioner's testimony.

Petitioner now claims that the prosecutor's use, to impeach petitioner's testimony, of the allegedly immunized statements on the tape recording deprived petitioner of his federal constitutional rights. It is undisputed that this contention was first raised in petitioner's state court motion to vacate

the judgment pursuant to New York Crim. Proc. Law §440.10, following affirmance of the conviction by the state appellate courts on direct appeal. In adjudicating petitioner's §440.10 motion, Justice Lang held that under the relevant state procedural rules, petitioner's claim was barred by his failure to raise the claim at trial in a timely fashion. Justice Lang further held that the claim was untenable on the merits, principally on the ground that the use of the recorded statements only for impeachment purposes was not unlawful even if petitioner in fact had been granted immunity.

On reargument, Justice Lang changed his analysis of the merits in light of the Supreme Court's intervening decision in New Jersey v. Portash, 440 U.S. 450 (1978), which held that statements given in response to a grant of immunity cannot be used to impeach the testimony of a

criminal defendant at trial. However, Justice Lang further held that the use of the recorded statements against petitioner was "harmless error beyond a reasonable doubt." In addition, Justice Lang adhered to his original decision that the immunity claim was barred by petitioner's procedural default.

The State contends that as a result of petitioner's state law procedural default, petitioner has forfeited his immunity claim as a ground for federal habeas relief under Wainwright v. Sykes, 433 U.S. 72 (1977). Under Sykes, where the state courts have held that a petitioner's federal claim is forfeited due to noncompliance with state procedural rules, federal habeas relief is also barred "absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation." 433

U.S. at 84; see Klein v. Harris, 667 F. 2d 274, 285 (2d Cir. 1981). Petitioner contends that Sykes is not applicable where, as in the instant case, the state courts have rejected the federal claim both on state procedural grounds and on the merits. The court first turns to this important threshold issue and then, having concluded that Sykes is applicable, next applies the Sykes cause-and-prejudice analysis to the facts of the instant case.

Sykes and its progeny address the difficult issue of whether state convictions which are premised on state procedural grounds are immune from review in the federal courts. It is clear that where a state court has held that the petitioner's federal claim is forfeited due to a procedural default and therefore has refused to hear the federal claim, the availability of federal habeas relief

is governed by the cause-and-prejudice analysis set forth in Sykes. Klein v. Harris, 667 F. 2d 274, 284-85 (2d Cir. 1981). It is also true that where a New York State appellate court affirms a conviction without opinion, and both procedural and substantive grounds supporting the conviction were argued to that court by the prosecution, the federal habeas court must presume that the state court decision was premised on the procedural default and that Sykes is therefore applicable. Martinez v. Harris, 675 F. 2d 51, 54-55 (2d Cir. 1982). On the other hand, since there is "no warrant. . . for guarding state procedural rules more vigilantly than the State itself does," Washington v. Harris, 650 F. 2d 447, 452 (2d Cir. 1981), cert. denied 102 S. Ct. 1455 (1982), Sykes does not bar federal habeas relief merely upon a showing that an adequate state

procedural ground was available to support the conviction; there must be a demonstration that the state courts expressly or impliedly relied on the procedural default. See, Klein, supra, 667 F. 2d at 285.

The precise issue now before the court, i.e., whether Sykes is applicable when the state court expressly relied on both a procedural bar and the merits of the underlying claim, has yet to be addressed by the Second Circuit and has divided the Courts of Appeals that have addressed the issue. Several courts have held that Sykes does not apply unless the state courts exclusively relied on the procedural default. See, Rogers v. McMullen, 673 F. 2d 1185, 1188 (11th Cir. 1982); Thompson v. Estelle, 642 F. 2d 996, 998 (5th Cir. 1981); Bradford v. Stone, 594 F. 2d 1294, 1296 n. 2 (9th Cir. 1979). The Sixth Circuit has held that

Sykes is applicable so long as the procedural default was a "substantial basis" of the state court's decision, Hockenbury v. Sowders, 620 F. 2d 111, 115 (6th Cir. 1980), cert. denied, 450 U.S. 933 (1981), and the Eighth Circuit has held that Sykes is applicable at least where the decision on the merits may be construed to be dicta, Dietz v. Solem, 640 F. 2d 126, 131-32 n. 1 (8th Cir. 1981). Finally, the Third Circuit has recently held that Sykes is applicable whenever the state courts rely on a procedural rule as an alternate holding. United States ex rel. Caruso v. Zelinsky, Nos. 81-2395 and 81-2484, slip op. at 10 (3d Cir. Sept. 22, 1982).

This court agrees with the Third Circuit's careful and persuasive analysis in Caruso. The Third Circuit reasoned that an alternate holding has the same preential force as a single holding, and

the same state interests are served by the enforcement of procedural rules irrespective of whether the state court proceeds to discuss the merits of the underlying dispute. Id. In addition, a state court may be inclined to offer its views on the merits simply to indicate that reliance on the procedural rule is not creating a harsh result in the given case, and it would not be desirable for federal habeas courts to discourage this practice. Id., slip op. at 10-11.

Finally, the court noted that a federal court may not withhold habeas relief due to a procedural default even when it is unclear whether the state courts relied on a procedural rule, see, e.g., Martinez, supra, 675 F. 2d at 54-55, and that "there is at least as much justification for respecting a procedural default ruling when there are alternate

holdings." Caruso, supra, slip op. at 11.

The essential principle underlying Sykes is that reasons of comity and finality should ordinarily preclude a federal court from reviewing state court judgments that rest on adequate and independent state grounds. See Martinez, supra, 675 F. 2d at 53. There are no sound reasons for refusing to apply this principle simply because the state judgment also rests, in the alternative, on the state court's view of federal law. Accordingly, the court holds that petitioner has forfeited his federal immunity claim as a ground for federal habeas relief unless he can demonstrate adequate cause for his procedural default and prejudice resulting from the alleged violation of federal law.

Petitioner attempts to demonstrate cause for his failure to raise a timely

objection to the use of the recorded statements by arguing that he lacked sufficient knowledge to inform his trial counsel of the immunity issue.

Petitioner claims that he was under the mistaken belief that the grant of immunity pertained only to prosecutions involving police corruption and that he had no idea that the immunity applied to his murder prosecution. In support of his contention petitioner asserts that several members of the United States Attorney's Office informed him that he had no such immunity.

Petitioner asserted this same claim before Justice Lang in petitioner's \$440.10 motion to vacate the judgment. People v. Phillips, 97 Misc. 2d 665 (S. Ct. N.Y. Co. 1979). Justice Lang rejected this contention on the basis of petitioner's own submissions to the court which included affidavits by petitioner

and by Michael Armstrong, the chief counsel to the Knapp Commission, asserting that petitioner was granted full and complete immunity for all matters concerning his statements to the Commission.² These affidavits led Justice Lang to conclude that "long prior to his indictment, the defendant was aware that he had, at least, a colorable claim of immunity." Id. at 667.

The court agrees with Justice Lang, on the basis of petitioner's own submissions both here and in the state courts, that petitioner had knowledge of at least a colorable claim of immunity prior to the commencement of his trial. Petitioner's alleged lack of knowledge simply cannot be reconciled with the

²The relevant affidavits are also included in the record of the instant petition.

evidence in the record offered by petitioner to establish the fact of the grant of immunity, which clearly indicates that petitioner understood that he had full and complete immunity with regard to the statements which were used to impeach his testimony at trial. Since the record establishes that the basis for a colorable constitutional claim was available at the time of trial, petitioner's purported unawareness of the claim is not sufficient cause to satisfy the Sykes standards. See Engle v. Isaac, 102 S. Ct. 1558, 1574-75 (1982).

Since petitioner has failed to show sufficient cause for not raising a timely objection to the prosecutor's use of the allegedly immunized statements, federal habeas review of his immunity claim is barred. Sykes, supra, 433 U.S. at 84. The petition is accordingly dismissed.

So Ordered

-35a-

Lee Gagliardi

U.S.D.J.

Dated: New York, New York

November 24, 1982.

Appendix C

SUPREME COURT: NEW YORK COUNTY
TRIAL TERM: PART 44

-----x

THE PEOPLE OF THE STATE OF
NEW YORK,

Plaintiff-Respondent,

Ind. No.
1370/72

-against-

WILLIAM R. PHILLIPS,

Defendant-Petitioner.

-----x

IRVING LANG, J.:

Defendant moves for reargument concerning this court's order of January 3, 1979, denying his motion to vacate, pursuant to Criminal Procedure Law section 440.10, judgments of the Supreme Court, New York County (BIRNS, J.), convicting him, after a jury trial, of two counts of murder and one count of attempted murder. In his motion to vacate, defendant contended, inter alia, that he was granted both transactional

and use immunity by Federal authorities. Defendant claimed that this grant of immunity was violated by the playing of a tape recording which he made for the Knapp Commission, allegedly in return for immunity.

This court denied defendant's motion to vacate on the grounds that his claims of immunity were not timely raised. The court also held, as an alternative ground, that even if defendant had been granted immunity, his recorded testimony was admissible because it was used to impeach him when he took the stand at trial.

Since this court's decision, the Supreme Court of the United States has held, in State of New Jersey v. Portash, that testimony for which a grant of use immunity is given cannot subsequently be to impeach a witness at trial. Defendant now moves for reargument of his motion to

vacate on the grounds that the Portash decision invalidates this court's denial of his motion.

Defendant's motion to reargue is granted, to the extent that this court acknowledges that the Portash decision prohibits immunized testimony from being used to impeach a witness at trial. However, the major thrust of this court's decision in its denial of defendant's motion to vacate was that the defendant's claims of immunity were not timely made. This holding is unaffected by Portash. The court therefore adheres to its original order denying defendant's motion to vacate. Moreover, the court finds that given the evidence of defendant's guilt, the use of his recorded testimony was harmless error beyond a reasonable doubt.

This constitutes the decision and order of the court.

-39a-

Dated: April 18, 1979

J.S.C.

Appendix D

The PEOPLE of the State of New York,
Plaintiff-Respondent,

v.

William R. PHILLIPS,
Defendant-Petitioner.

Supreme Court, Trial Term,
New York County, Part 44

January 3, 1979

William R. Phillips, defendant, pro
se (William M. Kunstler, New York City,
of counsel).

Robert M. Morgenthau, Dist. Atty.,
New York County (Robert M. Pitler and
Jerrold Tannenbaum, Ass't. Dist. Attys.,
of counsel), for plaintiff-respondent.

IRVING LANG, Judge:

The unique question posed by this
motion to vacate a judgment of conviction
is whether a claim of immunity can be

successfully raised after the conviction has been affirmed on appeal.

Defendant Phillips, a star witness at the public hearings of the Knapp Commission on police corruption, was convicted by jury verdict of two counts of murder and one count of attempted murder. A previous trial ended in a hung jury.

A motion to set aside the verdict was made and denied by Justice Birns. The convictions were unanimously affirmed by the Appellate Division (52 A.D. 2d 758, 384 N.Y.S. 2d 715 (1st Dept. 1976)), and leave to appeal to the Court of Appeals was denied by Chief Judge Breitel in May of 1976 (39 N.Y. 2d 949, 386 N.Y.S. 2d 1039, 352 N.E. 2d 894 (1976)).

The essence of the defendant's motion revolves around an alleged grant of immunity to Mr. Phillips by the U.S. Attorney for the Southern District of New

York. This grant of immunity was supposedly in return for Phillips' cooperation with and testimony before the Knapp Commission.

Assuming for purposes of this motion that such immunity was granted (a large assumption in light of the meager evidence submitted to support the claim), the defendant makes a two-pronged attack on his conviction. First, he claims that the entire prosecution is barred since it is the product of his Knapp Commission testimony)transactional immunity). Secondly, he maintains that the prosecution improperly used evidence obtained as a result of Phillips' cooperation with the Knapp Commission which was covered by his immunity agreement (use immunity).

The defendant claims that he was unaware that he had immunity during his second trial (the first having resulted

in a mistrial). In fact, the defendant asserts that he had been informed by members of the U.S. Attorney's Office that he had no such immunity (see affidavit of William M. Kunstler dated November 22, 1978). This assertion is difficult to square with the statement in the defendant's affidavit in support of the motion that he actively sought immunity from Michael Armstrong, counsel to the Knapp Commission, and received assurance that it would be granted (see defendant's affidavit, pp. 13 and 14). This statement is corroborated by Mr. Armstrong. (See Exhibit C annexed to the defendant's motion papers. Interestingly, there is no supporting affidavit from the alleged grantor of immunity, Whitney North Seymour, Jr., then United States Attorney for the Southern District of New York.) Thus, long prior to his indictment, the

defendant was aware that he had, at least, a colorable claim of immunity. Despite this knowledge, through the entire course of the two trials in this case, while the defendant was represented by two different and experienced defense attorneys, the issue of immunity was never raised.

It is also clear that the United States Attorney did not have the power to grant defendant immunity from state prosecution. The federal immunity statute in effect during the time of the supposed agreements between Mr. Armstrong and Mr. Seymour permitted a United States Attorney to grant only use or testimonial immunity, not transactional immunity. (18 U.S.C. §§6002, 6003). Nor is anything more required by the Constitution (Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)). And while a grant of immunity by federal

authorities is binding upon the states, the latter cannot be bound to give any greater degree of immunities than the federal authorities themselves can give (see Murphy v. Waterfront Commission, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964)).

But whether the claim is of testimonial or transactional immunity, it must be timely made.

Immunity is an enumerated ground for dismissal of an indictment (CPL 210.20[1][d]), but such a motion must be made prior to the commencement of trial (CPL 210.20[2]); and if the issue is not timely raised, the motion may be denied summarily (CPL 210.20[2]).³ A fortiori, a

³ Even for good cause shown, such motion can be entertained "in the interest of justice, . . . on the merits at any time before sentence." (CPL 210.20[2]) (emphasis supplied).

defendant cannot wait until four years after conviction to raise an issue which could have been raised at the very outset of the prosecution.

A motion to suppress testimony on the ground that the defendant had use immunity might have been made at the time of trial. The defense never made such a motion.

Timeliness in attack on indictments or suppression of evidence is essential to the orderly administration of justice.

While this court has found no cases related to belated claims of immunity, there are numbers of decisions holding that the failure to assert constitutional privileges and rights in a timely fashion precludes subsequent challenges. There is no sound reason or policy why a belated claim of immunity should be treated differently than other claims which have been uniformly rejected as

untimely (People v. Kenneally, 50 A.D. 2d 949, 376 N.Y.S. 2d 20 [3d Dept. 1975]; People v. Blim, 61 A.D. 2d 876, 402 N.Y.S. 2d 253 [3d Dept. 1978] [self-incrimination]; People v. Smith, 41 A.D. 2d 893, 342 N.Y.S. 2d 513 [4th Dept. 1973] [claim of illegally seized evidence]; People v. Greenridge, 46 A.D. 2d 947, 362 N.Y.S. 2d 212 [3d Dept. 1974] [claim of improper identification]; People v. Consolazio, 40 N.Y. 2d 446, 387 N.Y.S. 2d 62, 354 N.E. 2d 801 [1976] [objection to jury panel]; CPL 270.10[2]. See also, People v. Friola, 11 N.Y. 2d 157, 227 N.Y.S. 2d 423, 182 N.E. 2d 100 [1962]; People v. West, 12 N.Y. 2d 1090, 240 N.Y.S. 2d 159, 190 N.E. 2d 532 [1963]; People v. Huntley, 15 N.Y. 2d 72, 255 N.Y.S. 2d 838, 204 N.E. 2d 179 [1965]).

In any event, with regard to the tape recording which the defendant claims

was used illegally by the prosecution, the court notes that it was used to impeach the defendant's testimony when he took the stand and was identified by the defendant as being his voice. Such evidence, even if it was obtained by the prosecution through unconstitutional means, is admissible for impeachment purposes, on the theory that constitutional rights should not be used to protect a defendant from the consequences of blatant perjury (Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 [1954]; Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 [1971])).

In sum, the defendant's claim of transactional immunity is rejected as untimely and untenable. The defendant's claim of testimonial immunity is rejected as both untimely and the proper subject of use in the circumstances of this case.

The court has reviewed the remaining grounds asserted by the defendant and finds them without merit.

For all the foregoing reasons, the motion is denied in all respects.

Appendix E

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighteenth day of October, one thousand nine hundred and eighty-three.

-----x

WILLIAM R. PHILLIPS,

Plaintiff-Appellant,

v.

No.82-2375

HAROLD J. SMITH, Superin-
tendent, Attica Correctional
Facility,

Defendant-Appellee.

-----x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, William R. Phillips,

Upon consideration by the panel that heard the appeal, it is

-51a-

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by Francis X. Gindhart,
Chief Deputy Clerk

Appendix F (Affidavit of Michael F. Armstrong)

about police corruption and to work as an undercover agent. He made this agreement on the condition that he would be afforded immunity for matters which he described to the Commission.

5. The Commission did not have the power to grant immunity. Therefore, I requested Whitney North Seymour, Jr., the United States Attorney for the Southern District of New York, to agree that if Mr. Phillips' work resulted in substantial federal indictments of either organized crime figures or corrupt police officers, he would be granted immunity and Mr. Seymour would see to it that such immunity was honored by state authorities. Mr. Seymour agreed, and authorized me so to inform Mr. Phillips.

6. Pursuant to this agreement, Mr. Phillips worked as an undercover agent for the Commission for approximately five months. He participated in a total of 69 operations in which tape recorded conversations involving corruption were obtained. As of the time of the submission of the Commission report to the Mayor on December 26, 1972, Mr. Phillips' efforts had resulted in indictments of 31 individuals. Six federal and six New York County indictments named a total of 17 police officers and 14 other persons, most of whom were organized crime members. Many more indictments were anticipated as a result of Mr. Phillips' work, but his own indictment, on March 20, 1972, on charges of murder and attempted murder aborted most of these efforts.

7. During the summer of 1971, I recorded a conversation with Mr. Phillips, during which he recounted many of his experiences during his police career. He described in detail many instances of corruption, including his experience with a Jimmy Smith, who was a pimp and gambler operating on the East Side. This tape recording was made in order to demonstrate to the

Appendix F (Affidavit of Michael F. Armstrong)

commissioners the type of information to which Mr. Phillips could testify at a public hearing.

8. In other interviews with me and members of my staff, Mr. Phillips told us other details about corrupt dealings with Mr. Smith.

9. In his public testimony before the Knapp Commission, for which I prepared Mr. Phillips, he testified about an incident involving Mr. Smith. As with other such testimony, no names were used and the events were described in general terms.

10. In early 1972, it was revealed that Mr. Phillips was under investigation for the 1968 murder of Mr. Smith and one other person, and the attempted murder of a third person. He was subsequently indicted on March 20, 1972. During the course of the investigation of this matter, the Commission staff responded to all inquiries made by the District Attorney's office and made its files available to the investigators looking into the case. Police officers from the Internal Affairs Division had open access to Commission files. The Commission also made available tape recordings taken during the course of this investigation, including the tape recorded interview with Mr. Phillips referred to in paragraph 7 above.

11. It was my clear and unequivocal understanding that William Phillips, in return for his successful efforts in developing criminal cases against corrupt police officers and organized crime figures, would receive full and complete transactional immunity for all matters about which he gave information. I have spoken to Whitney North Seymour, Jr., Esq., formerly United States Attorney for the Southern District of New York, and he has no recollection contradictory to mine.

12. I am informed that the tape recorded interview of Mr. Phillips was used by the prosecution against him

Appendix F (Affidavit of Michael F. Armstrong)

at his trial. It is also clear that the information provided to the prosecutors by the Commission regarding Mr. Phillips' admitted contacts with Mr. Smith afforded leads which were followed up by detectives investigating the case and ultimately resulted in evidence used against Mr. Phillips. The detective who re-opened the investigation has stated that he did so on the basis of information obtained from Mr. Phillips' public testimony before the Knapp Commission.

/s/ MICHAEL F. ARMSTRONG
MICHAEL F. ARMSTRONG

Sworn to before me this
27th day of April, 1978.

/s/ JOAN FARRELL

Joan Farrell
Notary Public, State of New York
No. 03-4521830
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 23, 1980

Appendix G

STATE OF NEW YORK)

COUNTY OF NEW YORK) ss.: AFFIDAVIT

WHITNEY NORTH SEYMOUR, JR., being
duly sworn, deposes and says:

I am an attorney duly admitted to
the practice of law in the State of New
York and a member of the firm of Simpson,
Thacher & Bartlett, One Battery Park
Plaza, New York, New York.

During 1970 and 1973, I served as
United States Attorney for the Southern
District of New York.

In or about May of 1971, I had a
conversation with Michael Armstrong,
Counsel to the Commission to Investigate
Allegations of Police Corruption and New
York City Anti-Corruption Procedures,
regarding a police officer by the name of
William Phillips. We discussed the

Commission's proposed use of Phillips as an informant, undercover agent, and witness at public hearings as well as his possible usefulness as a witness in federal criminal prosecutions arising out of his efforts. I agreed that in return for his cooperation our office would not prosecute Mr. Phillips, and that we would do everything in our power to protect him from retaliatory prosecutions in the state courts as to any matters concerning which he provided assistance and cooperation. I understood at the time that my assurances would be relayed to Mr. Phillips and that they would have the legal effect of immunity by estoppel. I also understood that without such assurances, Mr. Phillips would not provide the cooperation which later proved so important in generating major reforms in the New York City Police Department, and I believed then (and now)

-57a-

that such assurances were very much in
the public interest.

WHITNEY NORTH SEYMOUR, JR.

Sworn to before me this
6th day of August, 1982.

Gertrude Hess Parker

Notary Public

No. 31-8277400

Appendix H

EDWARD M. SHAW
Attorney at Law
522 Fifth Avenue
New York, N.Y. 10036

October 12, 1976

Mr. William R. Phillips
No. 75A-322
P.O. Box 149
Attica, New York 14011

Dear Bill:

I am sorry for the delay in answering your letter. You should check with your lawyers about the legal theory you express as to possible consequences of informal or formal immunity with respect to the admissibility of the tapes you refer to.

My own reaction is that, unfortunately, your theory is wrong. Even if you had been granted formal use of immunity, you would not be protected against use by any law enforcement agency of these undercover tape remarks of yours in your homicide case. Use immunity, formal or informal, only protects against the use against you of what you might say, for example, when you testified in a grand jury pursuant to use immunity or against use of leads from such testimony. I am afraid that my own reaction is that whatever your immunity status, these tapes would be admissible.

I am sorry not to have a more optimistic reaction, although I repeat again that you should talk to your counsel.

-59a-

I have always been disturbed by the
result in your case, and wish you well.

Sincerely,

Edward M. Shaw

Appendix I

4237

W. Phillips-Defendant-direct

Q. Where?

A. 157 East 57th Street.

Q. You went to his apartment?

A. Yes sir, I did. I continued this for about three weeks, and every game I bet on I won, then about the fourth bet the team lost. In total, I bet about eight games, maybe nine games with Jimmy Smith. All won, everyone won but one. After the conclusion of the college football season in 1965 I had no further contact with Jimmy Smith.

Q. Was there any discussion about the monies that he owed you on the old score, that is the old arrest score? I'm not talking about betting scores.

A. That was a dead issue.

Q. You wrote that off?

A. yes, sir.

Q. I take it no pun was intended when you said that?

A. No, sir.

Q. A dead issue.

A. No sir.

MR. LITMAN: The jury will determine that, Your Honor.

THE COURT: All right.

4238

Q. Had you ever visited Jimmy Smith at any of his apartments after you collected the last bet?

A. No sir, I did not.

Q. In 1965?

A. No sir.

Q. Did you see Jimmy Smith after that?

A. I saw him maybe twice.

Q. Now will you tell this Court and jury where you saw Jimmy Smith after that, and approximately when, the circumstances under which you saw him?

A. Between the latter part of 1965, and the time he was killed I saw him twice, maybe three times. I had a conversation with him once. That was right in this building, in the Criminal Court Building where we are right now. What floor it was on, I don't remember. I bumped into him in the hallway. I was on another case down here in Court.

Q. He had a case pending?

A. Yes, sir.

Q. And you were in the Court on police business?

A. Yes sir, I said, "Hello, how are you?" He said, "Hello, how are you?" I said, "How's everything going?"

MR. LITMAN: Could we have the date, please?

THE COURT: .Could you fix the date, Mr. Phillips?

A. At that time I said I did not see Jimmy Smith--the last time I saw Jimmy Smith was 1968, and I meant 1965. I had '68 in my mind, and I made a slip of the tongue. I should have said '65.

Q. And did you say '65 before the grand jury when you testified on March 13th?

A. No, sir.

MR. LITMAN: Objection.

THE COURT: Objection will be sustained. The answer is stricken out. The jury is instructed to disregard it, and I do it on the predicate that you haven't laid a proper foundation for it.

BY MR. ROTHBLATT:

Q. Was there any intent on your part to say that it was 1968 that you saw Jimmy Smith when you testified?

MR. LITMAN: Your Honor, that's

monumentally irrelevant what his intent was. It's what he said under oath. I object.

THE COURT: Objection sustained. The witness has testified that it was a slip of the tongue, that he meant '65.

The next question.

BY MR. ROTHBLATT:

Q. And is there any question in your mind that

4505

THE COURT: Suppose we hold it up for the time being. If you wish, Mr. Rothblatt, you can just pass it in front of the jury right now.

MR. ROTHBLATT: Fine.

THE COURT: Just hold it up in front of the jury, and pass it along.

[Mr. Rothblatt complies]

THE COURT: All right. Mr.

Litman, you may cross-examine. Mr. Rothblatt has completed his direct. All right, Mr. Litman.

CROSS EXAMINATION

BY MR. LITMAN:

Q. Mr. Phillips, is the outcome of this case important to you, sir?

A. Most assuredly, yes.

Q. You have a very important interest at stake, sir?

A. My life.

Q. Now, Mr. Phillips, do you emphatically deny, in fact, categorically deny that you killed Jimmy Smith?

A. I most emphatically and categorically deny I shot Jimmy Smith or Sharon Stango or Charles Gonzalez.

Q. You most emphatically and categorically deny you ever visited Jimmy Smith in any of the houses of

prostitution after 1965?

A. I most categorically and emphatically deny that. Yes, sir.

Q. Now, Mr. Phillips, on numerous occasions when you were a police officer in connection with arrests you had made, did you bring the persons you had arrested to the Criminal Court Building, the building where you are sitting right now?

A. Numerous occasions.

Q. And on the occasions when you brought these individuals before the Court for arraignment, did you, sir, on those occasions swear to the truth of affidavits?

A. Yes, sir.

Q. On how many occasions, sir, will you admit to this jury that you swore to the truth of affidavits, knowing that what you swore to was not the truth?

A. I would say a couple of dozen times.

Q. About twenty-four different times you committed perjury in connection with swearing to affidavits, sir?

A. Approximately, yes.

Q. Now, in addition to that, sir, you've testified on occasion before Courts in this building in connection with petty cases called violations, misdemeanors and felony cases, is that correct, sir?

5080

Q. "Question: When you were transferred out of the detective division and reduced to the rank of Patrolman, did you ever make this fact known to Jimmy Smith?"

"Answer: No, I did not."

Did you make that answer to that question at the last trial?

A. Yes.

Q. Was it the truth?

A. Yes.

Q. "Question: Was that because he would be less anxious to pay you off if he knew you weren't a detective any more?"

"Answer: Yes, sir, that's correct."

Did you give that answer under oath at the last trial?

A. Yes, sir.

Q. Is it not a fact, sir, that the reason you didn't tell Jimmy Smith that you were flopped from the Detective Division is that he was still on your pad?

A. He was not on my pad.

Q. Isn't that the reason you didn't tell him you had flopped out of the detective division to patrolman, because you were anxious that he continue

5081

paying you off on your pad, Mr. Phillips?

A. I never had Jimmy on the pad.

Q. Now, other than omitting to tell Michael Armstrong about the scores at the Knapp Commission, you said you always told him the truth; is that correct?

A. Yes.

Q. And in relationship--in relationship to the shakedown you had of Jimmy Smith, were you working at the time with the same partner as in the Ginzer score that you told us about?

A. Yes.

Q. But with Jimmy Smith, that shakedown, it was with an informant who is different from the informant that you used in the Ginzer score; is that correct?

A. Yes.

Q. You went up to Jimmy's place with your partner?

A. Yes.

Q. Your partner went inside?

A. Yes.

Q. Jimmy Smith made an offer to your partner with respect to girls and prostitution.?

A. Yes.

MR. ROTHBLATT: Your Honor, hasn't this been testified to on cross? I submit, it is repititious.

5083

in cash of going from bodega to bodega, from peddler to peddler, from petty gambler to petty gambler; is that correct?

MR. ROTHBLATT: Your Honor, just a minute. I think that is argumentative. If that isn't argumentative, I don't know what is.

THE COURT: Sustained as to form, yes.

Q. I ask you, sir, did you put Jimmy Smith on the pad?

A. No.

Q. Mr. Phillips, you are aware that Jimmy Smith was arrested on numerous times between '65 and '68?

A. Numerous times; yes.

Q. In connection with his prostitution and bookmaking activities?

A. Yes.

Q. And that in fact was the reason why he moved his house of prostitution from place to place?

A. I would imagine he became well known to the police and had to keep moving around; yes, sir.

Q. Mr. Phillips, on the pad means, does it not, in a legal contract whereby the police officer is being paid regularly by a man for protection from arrest; is that correct?

5084

A. Yes.

Q. The issue of whether or not you put Jimmy Smith on the pad is very

important to the outcome of this trial;
do you understand that, sir?

MR. ROTHBLATT: Judge, I submit
this is argumentative. We are not
summing up now.

THE COURT: Objection overruled.

Q. Did you hear my question, sir?

A. Yes, I heard your question.

Q. Do you understand that the issue
of whether or not you put Jimmy Smith on
the pad is very important to the outcome
of this trial?

A. I think everything is important to
the outcome of this trial.

MR. LITMAN: Your Honor, could I
ask that be stricken, sir.

THE COURT: That will be
stricken.

Q. Do you understand, sir, that the
issue of whether or not you put Jimmy
Smith on the pad--withdrawn.

Do you understand whether or not you put Jimmy Smith on the pad is an issue that is important to the outcome of this trial? Do you understand that, sir?

A. Yes.

5085

Q. You understand, do you not, that if Jimmy Smith were on the pad, that is supposedly paying you off regularly by the month, that would give you a reason for visiting him regularly over an extended period of time?

MR. ROTHBLATT: Judge, this is argumentative. He is talking about--

THE COURT: Mr. Rothblatt--

MR. ROTHBLATT: Objection to the form of the question, argumentative, improper.

THE COURT: For all the grounds by counsel, Objection overruled.

Q. Do you want me to repeat the question, Mr. Phillips?

A. If you don't mind.

Q. Do you understand, do you not, that if Jimmy Smith were on the pad, that is supposedly paying you regularly by the month, that would give you reason for visiting him repeatedly over the years after your initial score; do you understand that?

MR. ROTHBLATT: Excuse me--

THE COURT: Objection overruled.

MR. ROTHBLATT: We have three different factors. I don't know which one the answer will pertain to.

5087

A. Yes.

Q. Was Jimmy Smith the only man you ever scored in a house of prostitution in the 17th Precinct?

A. In my precinct?

Q. Was Jimmy Smith the only person in the 17th Precinct you scored who was a bookmaker and ran a house of prostitution?

A. Yes.

Q. You are positive of that?

A.

Yes, I am positive.

Q. Mr. Phillips, did you ever tell anyone that you put on the pad for one hundred dollars a month that man you scored with your partner in the 17th Precinct who was a bookmaker and had a house of prostitution and who obviously is Jimmy Smith?

MR. ROTHBLATT: Well, Your Honor, I submit, this is argumentative--

THE COURT: Is there an objection?

MR. ROTHBLATT: Yes.

THE COURT: Overruled.

A. No.

Q. Never told that to a soul?

A. Never told it to anyone; no.

Q. Did you ever tell Michael
Armstrong, the

5088

Chief Counsel to the Knapp Commission
that you put on the pad for one hundred
dollars a month the man you scored with
your partner in the 17th Precinct, who
was a bookmaker and had a house of
prostitution and who obviously is Jimmy
Smith?

A. No, sir, not to my recollection.

Q. Not to your what, sir?

A. Not to my recollection.

Q. Did you ever tell him that?

A. No.

Q. Are you sure of that?

A. Yes.

Q. As sure as you are of the rest of
your testimony, sir?

A. Yes, sir.

Q. Thank you, Mr. Phillips.

MR. LITMAN: I have no further questions, Your Honor.

THE COURT: Would you want to go over with your redirect after lunch?

MR. ROTHBLATT: I would like to have some redirect now.

THE COURT: You might do it.

REDIRECT EXAMINATION

5194

Phillips-Deft-Recross

THE COURT: Do you have much more of this witness on recross?

MR. LITMAN: No, Your Honor.

THE COURT: Let's move ahead.

Q. Mr. Phillips, did you tell Michael Armstrong that after you scored the man who was a bookmaker and ran a house of prostitution in the 17th Precinct, that you put that man--who obviously is Jimmy Smith--on the pad for

a hundred dollars a month? Didn't you tell that to Michael Armstrong?

A. No, sir, I did not.

Q. Do you think you would recognize your own voice on tape, Mr. Phillips?

A. I guess so.

Q. You guess so?

A. Yeah.

Q. Do you remember telling Mr. Armstrong about the shakedown and the score you made in the Ginzer Restaurant?

A. Yes.

Q. And do you remember after you told him this, in the early summer of 1971, and you said, "GiGi gave us three thousand dollars, now let's see--uh--and Mr. Armstrong said to you: "When you say "us" you

5195

mean--" And you answered --

Do you remember, this, Mr. Phillips--"My partner, yeah, and then we

had another deal--this other individual we had for an informant, gave us information on a bookmaker and prostitution operation which we got in to this particular location, he did, and he made the offer and took the money and I came in and we, so, offered this man to be released for the sum of five thousand dollars, which he never got up. He got up fifteen hundred dollars--eighteen hundred dollars that particular night and then we put him on the pad for a hundred dollars a month."

Do you remember telling that to Michael Armstrong, Mr. Phillips?

A. No sir, I don't.

MR. ROTHBLATT: Your Honor, may we have an instruction that this is a question that has been answered in the negative.

THE COURT: What?

MR. LITMAN: Sorry.

-80a-

MR. ROTHBLATT: This is a question that has been answered in the negative.

THE COURT: The answer was--

MR. LITMAN: It is for the jury to determine

Appendix J

Daily News, Friday, November 15, 1974

page 44

"TAPE CATCHES ROGUE COP IN CONTRADICTION"

by D.J. Saunders

In a dramatic and unexpected turn, rogue cop William Phillips apparently got caught in a lie yesterday--as the prosecution played a key tape recording directly contradicting Phillips' testimony earlier in the day that he had not put pimp Jimmy Goldberg "on the pad" for regular payoffs.

Phillips is on trial in Manhattan Supreme Court for allegedly killing Goldberg, alias Smith, and one of Goldberg's prostitutes on Christmas Eve 1968 after Goldberg had refused to give him a \$1,000 payoff.

Defendant Pale

As Phillips sat quietly, pale and motionless with his head case downward

and over the bitter and loud objections of his defense attorney, Assistant District Attorney Jack Litman played a tape-recorded portion of a conversation Phillips had in the summer of 1971 with Michael Armstrong, then chief counsel of the Knapp Commission probe into police corruption.

The all-male jury listened intently and followed the taped conversation with a printed transcript as Phillips described to Armstrong how he had shaken down, for \$100 a month, a man who ran a house of prostitution and who was also a bookmaker.

Phillips had testified earlier in the trial that the only man he had ever scored (took a payoff) who both ran a house of prostitution and was a bookmaker was Jimmy Goldberg.

Denies Payoffs

Earlier in the day, Litman asked Phillips, in his fourth day of cross-examination, whether he had ever taken regular payoffs from Goldberg.

"No, sir, replied Phillips, apparently contradicting the tape.

"Whether or not you put Jimmy on the pad is important to the outcome of the case, isn't it?" asked Litman.

"Yes, sir," responded Phillips. The prosecution has contended that Goldberg had been paying Phillips off on a regular basis from 1965, when they first met, until Christmas Eve 1968, when Phillips allegedly killed him.

Phillips swore to the court yesterday that he had not seen Goldberg since 1965. Under unyielding and precise questioning by Mr. Litman, Phillips said that he had erred in testifying as a witness in a gambling case two years ago

in Manhattan Federal Court that he had seen Goldberg in the fall of 1968.

"It was a slip of the tongue," Phillips said, adding, "Anybody can make a mistake."

Phillips insisted, "I never had Jimmy on the pad."

Then late in the afternoon after playing the tape-recorded conversation, Litman said that he had only one more question for Phillips:

"I ask you again, sir, did you put on the pad the only man you ever scored who ran a house of prostitution and who was a bookmaker and who is obviously Jimmy Smith?"

"He never went on the pad for \$100 a month, no sir," Phillips replied meekly.

"I have no further questions," said Litman as he sat down.

No. 83-1052

Office - Supreme Court, U.S.

FILED

JAN 26 1984

ALEXANDER L. STEVENS

CLERK

IN THE
Supreme Court of the United States

October Term, 1983

WILLIAM R. PHILLIPS,

Petitioner,

against

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

ROBERT M. MORGENTHAU

District Attorney

New York County

Attorney for Respondent

One Hogan Place

New York, New York 10013

(212) 553-9000

ROBERT M. PITLER

DAVID H. STEINER

Assistant District Attorneys

Of Counsel

Counter-Statement of Question Presented

May a federal court sitting in habeas corpus review of a state conviction, which is otherwise precluded from entertaining a claim forfeited in state court, nonetheless entertain that claim merely because a state court, in addition to its unequivocal forfeiture holding, also summarily concluded that the error, if any, was harmless?

The court below answered this question in the negative.

TABLE OF CONTENTS

	PAGE
Counter-Statement of Question Presented	I
Preliminary Statement	1
Statement of the Case	2
A. Introduction	2
B. The State Trial and Direct Appeal	3
C. The State Post-Judgment Motion Concerning the Tape Recording	6
D. The Federal Court Proceedings Relating to the Immunity Issue	8
Reasons for Denying the Writ	11
Conclusion	18

TABLE OF AUTHORITIES

PAGE

Cases:

Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981)	14
Bradford v. Stone, 594 F.2d 1294 (9th Cir. 1979)	12
Darden v. State, 329 So. 2d 287 (Fla. 1976), <i>cert. dismissed</i> , 430 U.S. 704 (1977)	13
Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983)	13, 14
Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981)	11
Ex Parte Thompson, Writ No. W78-50004-L (Crim. Dist. Ct. Texas 1/27/78)	13
Hockenbury v. Sowders, 620 F.2d 111 (6th Cir.), <i>cert. denied</i> , 450 U.S. 933 (1981)	11
Lowery v. Estelle, 696 F.2d 333 (5th Cir. 1983)	12, 13, 14
Michigan v. Long, — U.S. —, 103 S. Ct. 3469 (1983)	16, 17
New Jersey v. Portash, 440 U.S. 450 (1979)	8
Phillips v. Smith, 717 F.2d 44 (2d Cir. 1983)	10, 11, 16, 17
Phillips v. Smith, 552 F. Supp. 653 (S.D.N.Y. 1982)	9
Ratcliff v. Estelle, 597 F.2d 474 (5th Cir.), <i>cert. denied</i> , 444 U.S. 868 (1979)	11, 13, 14
Rogers v. McMullen, 673 F.2d 1185 (11th Cir.), <i>cert. denied</i> , — U.S. —, 74 L.Ed. 2d 961 (1983)	13, 14
Smith v. Phillips, 455 U.S. 209 (1982)	9
State v. Rodgers, 347 So.2d 610 (Fla. 1977)	14
Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981)	12, 13, 14

United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3d Cir. 1982)	11, 16
United States ex rel. Veal v. DeRobertis, 693 F.2d 642 (7th Cir. 1982)	11
Wainwright v. Sykes, 433 U.S. 72 (1977)	9, 10, 12, 15, 16, 17
Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983)	14

Statutes:

New York Criminal Procedure Law §440.10	6
New York Criminal Procedure Law §710.20(3)	7
New York Criminal Procedure Law §710.20(4)	7
New York Criminal Procedure Law §710.70(3)	7
New York Penal Law former §110.00	2
New York Penal Law former §125.25	2

No. 83-1052

IN THE
Supreme Court of the United States
October Term, 1983

WILLIAM R. PHILLIPS,

Petitioner,

against

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Preliminary Statement

Petitioner seeks a writ of certiorari to review a September 2, 1983 judgment of the United States Court of Appeals for the Second Circuit. By that judgment, the Court of Appeals unanimously affirmed a November 24, 1982 order of the United States District Court for the Southern District of New York (Lee P. Gagliardi, D.J.), denying a

petition for a writ of habeas corpus. In his petition, Phillips sought to vacate a January 28, 1975 judgment of the New York Supreme Court, New York County, convicting him after trial by jury of two counts of Murder (former New York Penal Law §125.25) and one count of Attempted Murder (former New York Penal Law §§110.00/125.25). Phillips was sentenced to concurrent indeterminate terms of from twenty-five years to life imprisonment for the murder convictions and eight and one-third to twenty-five years for the attempted murder conviction. He is currently serving this sentence.

Statement of the Case

A. Introduction

Between 1965 and 1968, William Phillips, a corrupt New York City police officer, had extorted regular payoffs from a pimp and bookmaker named Jimmy Smith. On Christmas Eve, 1968, Phillips went to Smith's brothel and, when Smith refused to make the payment demanded, Phillips shot and killed him. Phillips then shot two eyewitnesses, Sharon Stango, a nineteen-year-old prostitute who worked for Smith, and Charles Gonzalez, a customer at the brothel. Stango was killed, but Gonzalez, though seriously wounded, survived.

After the Smith-Stango murders, the police had obtained a description and composite sketch of the murderer from Charles Gonzalez and Richie Stevens, a handyman at Smith's building who had seen the murderer going to and from the murder scene. In addition, one of Smith's pros-

titutes had suggested that the murderer was a policeman. The investigation continued, but without success.

In late 1971, Phillips testified at the televised hearings on police corruption conducted by the New York City Knapp Commission. When Phillips appeared on television, a detective working on the Smith-Stango murders noticed that Phillips resembled the composite sketch which had been obtained from the eyewitnesses. Phillips subsequently was identified by both Gonzalez and Stevens. He also was identified by several of Smith's ex-prostitutes and customers, who had seen him in Smith's company numerous times and had overheard him demanding money from Smith under the threat of force.

Subsequently, a New York County grand jury charged Phillips with the murders of Smith and Stango and the attempted murder of Gonzalez (Ind. No. 1370-72). Phillips proceeded to trial on June 28, 1972. On August 9, 1972, the jury reported itself unable to reach a verdict, and a mistrial was declared.

B. The State Trial and Direct Appeal

Petitioner's second trial, the subject of the instant petition, began in New York State Supreme Court on September 16, 1974. During the nine-week trial, forty-four witnesses, including petitioner, testified.*

* Because the sufficiency of the evidence of petitioner's guilt is not an issue here, the evidence adduced at the lengthy trial will not be recounted in full. Such an account can be found in the State's memorandum of law to the District Court, filed in response to the renewed petition, at pp. 2-27. This memorandum was part of the record before the Second Circuit and will be forwarded upon request.

Charles Gonzalez, the surviving victim, identified petitioner as the man who shot him, after shooting Jimmy Smith and Sharon Stango at point blank range in the head (Gonzalez: 634-38). Richie Stevens, the handyman of Smith's building, also identified petitioner as the man who entered the building moments before the killings, went up to Smith's apartment, and then left the building moments before the bodies were discovered (Stevens: 2090-01, 2101-03). There was also testimony from several of Smith's prostitutes and customers that petitioner had been shaking down Smith for money since 1965, repeatedly came to Smith as Christmas Eve 1968 approached to demand money, and, the night before the murders, threatened to "blow Smith's . . . head off" if Smith did not pay petitioner \$1000 the following day (Rodgers: 1381, 1387; Charmello: 2334-42, 2347-48, 2356, 2488-89; Stevens: 2082; Lee: 1110; Schafer: 1252, 1277; Connolly: 939-40). In addition, the prosecution introduced without objection Phillips' testimony at an unrelated federal trial, in which he testified that he visited Smith eight to ten times at Smith's apartment during the fall of 1968 (1633-37; Peo. Exh. 52).

Petitioner denied having committed the murders. He admitted extorting money from Smith, but denied any contact with him after 1965 (Phillips: 4223-26, 4237-38, 4506-08). He also presented an alibi defense and called several relatives and friends in an attempt to show that he and his wife were in Queens at the time of the shootings (Phillips: 4493-99; Mrs. Phillips: 3431-36, 3439-40; Slack: 3173, 3186-87; J. McKee: 3726; M. McKee: 5250-51; Leavy: 3800-06; Callahan: 5228).

On cross-examination, Mrs. Phillips admitted having told a police officer between the first and second trials that she had lied at the first trial when she testified that petitioner was with her at the approximate time of the murders (Mrs. Phillips: 3554-56).

During cross-examination of petitioner, a tape recording which petitioner had made while cooperating with the Knapp Commission was played. On that recording, Phillips asserted, contrary to what he had said on direct examination, that he was extorting \$100 monthly from Jimmy Smith after 1965.* After hearing the recording, Phillips admitted that it was of his voice, but still denied having had Smith "on the pad" for \$100 per month (Phillips: 5195, 5215-18).

On cross-examination, petitioner also admitted knowing that the murderer had been described as wearing a green turtleneck sweater, but maintained that he did not own such a sweater and that he never wore green clothes (Phillips: 4692-93). On rebuttal, the People introduced three photographs taken by Henry Bergman, petitioner's business partner, showing petitioner wearing different green shirts (Bergman: 5462-66; Peo. Exhs. 112A, B, D). Bergman also recalled seeing petitioner dressed in green clothes on several occasions, including a green striped polo shirt, a green banlon shirt, and a forest green turtleneck sweater (Bergman: 5457-59).

* In its direct case, the People had introduced Phillips' testimony at an unrelated federal trial, in which he testified that he had visited Smith eight to ten times at Smith's apartment during the fall of 1968 (1633-37; Peo. Exh. 52). Phillips' assertions on direct examination in the instant case were inconsistent with this prior testimony, as well as with his statement on the recording.

On November 21, 1974, after just nine hours of deliberation, the jury convicted petitioner of the murders of Smith and Stango and the attempted murder of Gonzalez. On April 26, 1976, the state Appellate Division, First Department, unanimously affirmed the judgment of conviction without opinion. On May 28, 1976, leave to appeal to the New York Court of Appeals was denied by Chief Judge Charles Breitel.

**C. The State Post-Judgment Motion
Concerning the Tape Recording**

On three separate occasions petitioner was unsuccessful in collaterally attacking his conviction in state court. Pertinent to this appeal, on April 25, 1978, petitioner moved in Supreme Court, New York County (Irving Lang, J.), pursuant to section 440.10 of the New York Criminal Procedure Law, to vacate the judgment of conviction. In this motion, petitioner claimed, for the first time, two years after the conclusion of his direct appeal, three years after his conviction, and six years after his indictment, that a tape recording was improperly used at trial because that recording was obtained pursuant to a grant of immunity. The tape recording at issue was used during cross-examination to impeach petitioner's direct testimony that he never had visited nor ever had extorted money from Smith after 1965. In the recording, Phillips had admitted to Knapp Commission counsel Michael Armstrong that he had put Smith "on the pad" for \$100 per month after 1965.

In his motion, petitioner claimed that the tape recording should have been suppressed because it was made in return

for a promise of immunity. Petitioner alleged that he had received both transactional and testimonial immunity from the United States Attorney for the Southern District of New York. In response to the transactional immunity claim, respondent argued that a United States Attorney had no power to grant transactional immunity that would preclude a state prosecution (Memorandum of Law, pp. 27-31).^{*} In response to the testimonial immunity claim, respondent argued that it was time barred.^{**}

On January 3, 1979, the state court judge denied the motion in a written opinion. In doing so, he found that petitioner's argument had two distinct parts. First was the contention that the entire state prosecution was barred because of a grant of transactional immunity. Second was the claim that the use of the tape recording was forbidden by the conferral of testimonial immunity (App: 42a).[†] The court then described petitioner's alternative argument that he had been unaware of the immunity grant and that such unawareness should excuse any procedural default (App: 42a-44a).

In addressing these claims, the state court expressed serious doubt about whether a United States Attorney could grant transactional immunity that would bar a state prose-

^{*} The memorandum in which the State made its arguments, as well as the State's April 4, 1979 letter responding to petitioner's subsequent motion for reargument are not included in petitioner's appendix, but were before the courts below. Both are available upon request.

^{**} Read together, New York Criminal Procedure Law section 710.20(3) & (4) and 710.70(3) require that a motion to suppress involuntary, *e.g.* immunized, statements, be made timely and a defendant who fails to make a timely motion waives his right to judicial determination of such a claim.

[†] "App" in parentheses followed by a number refers to the appendix attached to the Petition for a Writ of Certiorari.

cution. The court, however, then stated that "whether the claim is of testimonial or transactional immunity, it must be timely made" (App: 45a). The judge discussed New York law governing timeliness, concluding that the immunity claims were time barred. The court noted in passing that, in any event, the tape recording in question properly could be used for purposes of impeachment (App: 46a-48a).

Subsequently, petitioner moved for reargument on the ground that *New Jersey v. Portash*, 440 U.S. 450 (1979), prohibited the impeachment use of immunized testimony. In opposition to the motion for reargument, the People stated merely that the claim was time barred (*see* letter of April 4, 1979). The state judge granted reargument and agreed with petitioner that *Portash* prohibited the use of immunized testimony. The court, however, declared unequivocally that petitioner's procedural default was the primary basis, or "major thrust," of its decision to deny the motion to vacate. In passing, the court noted that the tape could not properly have been used for impeachment; nonetheless its use was "harmless error" (App: 37a-38a).^{*} Leave to appeal this order to the Appellate Division was denied.

D. The Federal Court Proceedings Relating to the Immunity Issue

On April 5, 1979, Phillips filed a petition in the Southern District of New York for a federal writ of habeas corpus, raising the immunity issue as well as two issues involving

^{*} In its first opinion, the state court, in assuming for purposes of its decision that immunity had been granted, declared that this was "a large assumption in light of the meager evidence submitted to support the claim" (App: 42a). The court seemed to make the same "large assumption" in deciding that use of the tape was harmless error.

alleged juror misconduct. Judge Lawrence Pierce never reached the immunity question, but granted the writ on the ground that a juror was impliedly biased. On September 26, 1980, a divided Second Circuit panel affirmed Judge Pierce's order. However, on January 25, 1982, this Court reversed and remanded for further proceedings in conformity with its opinion, in effect reinstating the state conviction. 455 U.S. 209 (1982).*

Phillips renewed his petition seeking relief based upon the immunity claim, and respondent renewed its motion to dismiss for failure to state a claim. On November 24, 1982, Judge Gagliardi denied the writ, concluding that the state court had found petitioner's procedural default to be an adequate, independent state procedural ground for denial of his post-judgment motion. 552 F. Supp. 653. Therefore, under *Wainwright v. Sykes*, 433 U.S. 72 (1977), the federal courts could not consider the merits of Phillips' claim unless he demonstrated "adequate cause for his procedural default and prejudice resulting from the alleged violation of federal law." The court found no reason to depart from this principle simply because the state court also had mentioned in passing that use of the tape segment on cross-examination was harmless error (App: 31a).

With regard to Phillips' argument that his alleged lack of knowledge of an immunity grant was sufficient cause for the procedural default, the court found that Phillips' own submissions, including affidavits by himself and by Michael Armstrong, chief counsel to the Knapp Commission, demon-

* Contrary to petitioner's assertion (Petition for Certiorari: 21), this Court did not remand for consideration of the immunity claim, which never was before it.

strated that prior to trial he had been informed of a grant of immunity covering all statements made by him to the Commission. Thus, the court held, in view of Phillips' "knowledge of at least a colorable claim of immunity prior to the commencement of his trial," he had shown no cause for his failure to raise this claim (App: 32a-34a).

On September 2, 1983, the Second Circuit unanimously affirmed the denial of the petition for habeas corpus. 717 F.2d 44. The court held that "explicit state court reliance on a procedural default bars federal habeas review of the forfeited claim absent a showing of cause and prejudice regardless of whether the state court ruled alternatively on the merits of the forfeited claim" (App: 9a). The court reasoned that the principle of comity requires federal courts to respect the states' application of their own procedural rules, and an alternative disposition on the merits does not undermine the validity, adequacy or independence of the procedural ground. Also, the goals of finality, accuracy and trial integrity are best served when state courts dispose of all issues, including the merits, so state courts should feel free to rule in the alternative without fear of federal habeas corpus intervention (App: 11a-12a). Finally, applying the *Sykes* "cause and prejudice" test, the court rejected petitioner's claim that his unawareness of an immunity grant was sufficient cause for his default, because "his own sworn statements establish[ed] just the opposite" (App: 16a-17a).

On October 18, 1983, petitioner's motion for rehearing was denied.

Reasons for Denying the Writ

1. Petitioner argues that certiorari should be granted because there is a conflict among the circuits about whether alternative state court holdings on a procedural default and on the merits bar federal habeas corpus relief. The court below seemed to share the belief that the circuits are divided on the question. Nonetheless, upon analysis of the various circuit court decisions, the alleged conflict disappears.

Six circuits, including the court below, have explicitly concluded that federal habeas corpus review is barred in the face of alternative state court holdings giving effect to a state procedural default and also deciding the merits. *Phillips v. Smith*, 717 F.2d 44, 48 (2d Cir. 1983); *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642, 650 (7th Cir. 1982); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982); *Dietz v. Solem*, 640 F.2d 126, 132 n.1 (8th Cir. 1981); *Hockenbury v. Sowders*, 620 F.2d 111, 115 (6th Cir.), *cert. denied*, 450 U.S. 933 (1981); *Ratcliff v. Estelle*, 597 F.2d 474, 478 (5th Cir.), *cert. denied*, 444 U.S. 868 (1979). Three of these circuits, including the court below, analyzed the issue in depth before reaching their conclusions. *Phillips v. Smith*, *supra*; *United States ex rel. Caruso v. Zelinsky*, *supra*; *Ratcliff v. Estelle*, *supra*.

The so-called conflict is said to result from language contained in decisions of the Ninth, Fifth, and Eleventh Circuit. However, not one of these decisions even analyzes the issue. Indeed, it is far from clear that any of these three circuits actually reached a holding contrary to that of the court below.

First, the extent of petitioner's Ninth Circuit authority is a footnote in *Bradford v. Stone*, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979). In that footnote, the court assumed for the sake of argument that the state court's failure to rest exclusively upon the procedural default permitted federal court consideration of the constitutional claim. This assumption hardly constitutes a holding, a fact recognized by the court below. 717 F.2d at 50.

Second, from the Fifth Circuit, petitioner cites *Lowery v. Estelle*, 696 F.2d 333 (5th Cir. 1983), and *Thompson v. Estelle*, 642 F.2d 996 (5th Cir. 1981). However, in *Lowery*, the reference to the issue of alternative holdings is contained in a brief footnote, and no language supports petitioner's assertion that the court held in his favor. Rather, the Fifth Circuit found unequivocally that the state court had not relied upon the petitioner's procedural default, but rather had "rested" its decision "on its determination that his several claims were 'totally without merit.' " *Lowery v. Estelle*, 696 F.2d at 342 n.28. Thus, the federal courts were not presented with an express default ruling, even in the alternative.

Similarly, *Thompson v. Estelle*, *supra*, the other Fifth Circuit case relied upon by petitioner, did not present the issue of actual alternative rulings. True, the court in *Thompson* did state that, "Because the state courts have not relied exclusively upon Thompson's procedural default, *Wainwright v. Sykes* does not prevent federal habeas review." *Id.* at 998. Nonetheless, this statement must be read in the context of the state court opinions before the Fifth Circuit. In the final state opinion dealing with the

case, deciding a state petition for a writ of habeas corpus, the state court considered only the merits. *Ex Parte Thompson*, Writ No. W78-50004-L, ¶¶7, 8, 13 (Crim. Dist. Ct. Tex. 1/27/78). Thus, the language in *Thompson*, so heavily relied upon by petitioner to show a conflict, was nothing but *dicta*. Moreover, neither in *Lowery* or *Thompson*, nor in any other case, has the Fifth Circuit overruled or disapproved even implicitly its 1979 decision in *Ratcliff v. Estelle*, *supra*. In the *Ratcliff* case, the court fully analyzed the issue of federal habeas corpus review following actual alternative state court rulings, and held unequivocally that the federal courts were barred from reaching the merits. *Id.* at 475-478.

Third, from the Eleventh Circuit, petitioner cites *Darden v. Wainwright*, 699 F.2d 1031 (11th Cir. 1983), and *Rogers v. McMullen*, 673 F.2d 1185 (11th Cir.), *cert. denied*, — U.S. —, 74 L.Ed. 2d 961 (1983). In *Darden*, the court stated merely that “where a state appellate court has adjudicated an issue on its merits, federal courts may consider it in a petition for habeas corpus.” That no alternative forfeiture holding was at issue in *Darden* is shown by the defense trial objection to the state prosecutor’s conduct and, more importantly, by the Florida Supreme Court’s ruling on the merits. That ruling, which encompassed almost all of the state court’s four page opinion, is in contrast to the single paragraph at the close of the opinion in which the court mentioned in passing the single defense objection. *See Darden v. State*, 329 So. 2d 287, 289-91 (Fla. 1976), *cert. dismissed*, 430 U.S. 704 (1977). The ruling on the merits clearly was, as found by the Eleventh Circuit, the “primary basis of its decision.” *Id.* at 1033-34 and n.4.

Also indicative of the absence of any state forfeiture holding in *Darden* is the Eleventh Circuit's statement that *Ratcliff v. Estelle*, *supra*, "does not compel a contrary result." *Id.*; see also *Witt v. Wainwright*, 714 F.2d 1069, 1082 n.10 (11th Cir. 1983). *Ratcliff*, discussed at page 13, *supra*, is the Fifth Circuit case holding unequivocally that alternative state holdings bar federal habeas corpus review.*

In addition, the other Eleventh Circuit case upon which petitioner relies, *Rogers v. McMullen*, *supra*, like *Darden*, and the Fifth Circuit's decisions in *Lowery* and *Thompson*, did not present the issue of a state alternative procedural holding. The court did quote the language from *Thompson* that a state procedural holding must be "exclusive" to bar federal consideration of the merits. *Rogers v. McMullen*, 673 F.2d at 1188. However, there was no alternative state forfeiture holding because the Florida Supreme Court had ruled only on the merits of the petitioner's claim. Thus, the language of the Circuit is but *dicta*. See *State v. Rodgers*, 347 So.2d 610 (Fla. 1977).

As seen from the above discussion, no Circuit Court has ever held that a federal habeas corpus court may ignore a state holding of forfeiture if that holding is accompanied by a resolution of the merits. And certainly, no Circuit Court has refused to give effect to a state holding of forfeiture merely because the state court also said the error, if any, was harmless. Thus, the alleged conflict among the circuits is more apparent than real. Indeed, in none of the cases relied upon by petitioner did the federal court even

* The Eleventh Circuit has adopted as binding precedent all of the decisions of the Fifth Circuit handed down on or before September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

discuss or analyze whether an alternative state holding should bar federal habeas corpus relief. Such discussion and analysis surely will be stimulated by the opinion below, especially if certiorari is denied. Perhaps then a real conflict would arise. Until then, there is no reason for this Court to consider the question presented here.

2. Petitioner also argues that certiorari should be granted because the holding of the court below is in conflict with the principles governing habeas corpus review articulated in *Wainwright v. Sykes*, 433 U.S. 72 (1977). As revealed by an examination of the opinion below, there is no inconsistency with the principles of *Sykes*. Before examining the decision below, it is necessary to review briefly the state court opinions.

In its first opinion, the state court initially assumed for the sake of argument that the claim of an immunity grant was true, but opined that the United States Attorney had no power to grant transactional immunity (App: 44a). Then, in the lengthiest portion of the opinion, the court analyzed the state rules on the timeliness of immunity claims, and held the contentions that petitioner had received both transactional and testimonial immunity time barred (App: 45a-47a). Finally, again assuming the truth of Phillips' assertions, the court as an afterthought stated that the tape properly had been used for impeachment (App: 48a). In its second and final opinion, the court explicitly reiterated that "the major thrust" of its decision was that petitioner's "claims of immunity were not timely made" (App: 38a). The court's only reference to the merits in that opinion was another hypothetical assumption

that the immunity claim was true and the consequent observation that, in such case, use of the tape was "harmless beyond a reasonable doubt" (App: 38a).

This review of the state court opinions ineluctably leads to the conclusion that, as found by the court below, "the adequacy, independence and primacy of the state court's holding on procedural grounds is 'apparent from the four corners of the opinion.' " 717 F.2d at 50, quoting *Michigan v. Long*, — U.S. —, at —, 103 S. Ct. 3469, at 3474-76 (1983). Given this unequivocal state court procedural determination, the decision of the court below was completely consistent with this Court's opinion in *Wainwright v. Sykes*, *supra*.

True, in *Sykes*, the state court held only that a claim was time barred without mentioning the "merits." Nonetheless, the opinion below eloquently and persuasively demonstrates why the policies underlying *Sykes* apply with equal force here. We state briefly why the *Sykes* principles were properly applied.

The most important principle discussed in *Sykes* is that our federal system requires federal courts, as a matter of comity, to respect state procedural rules. Thus, if a state court refuses to consider a claim on the ground of a procedural forfeiture, the federal courts may not ignore that waiver and consider the merits. 433 U.S. at 88. As both the court below and the Third Circuit have held, a state court's alternative discussion of merits does not diminish the effect of the procedural holding as "binding precedent" and cannot, therefore, lessen its preclusive effect. *Phillips v. Smith*, 717 F.2d at 49; *United States ex rel. Caruso v.*

Zelinsky, 689 F.2d at 440. Moreover, here, the state holding regarding forfeiture is absolute. That the state court assumed *arguendo* the truth of the alleged immunity grant, but went on to conclude that any error was harmless, makes clear that the court referred to the "merits" merely to show that its reliance upon default was causing no injustice. *Id.*; *Phillips v. Smith*, 717 F.2d at 51. The interest of comity requires that the federal courts not defeat this purpose and influence the form of a state court determination by refusing to follow an explicit procedural holding. Just as the policy of comity requires that *Sykes* controls here, as the court below also concluded the other policies discussed in *Sykes*, finality, trial accuracy and trial integrity, are fully applicable (see 717 F.2d at 48-49).

Finally, the *Sykes* principles rest upon jurisdictional concepts similar to those governing this Court's review of state decisions on direct appeal. The Court recently has reaffirmed the established rule that it will not grant review if the state court judgment rests "alternatively" upon two grounds, one of which is an independent and adequate non-federal ground. *Michigan v. Long*, — U.S. — at —, 93 S. Ct. at 3474-78 and n.4. No doubt this principle would require denial of the petition for certiorari if this case arose on direct review of the state court judgment. The teaching of *Sykes* is to the same effect—that when the state courts have found a procedural default, the petitioner for purposes of federal habeas corpus review is not in custody in violation of the Federal Constitution. *Wainwright v. Sykes*, 433 U.S. at 81. Thus, the holding of the court below is in full accord with the principles of *Sykes* governing federal habeas corpus review of state convictions.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent

ROBERT M. PITLER
DAVID H. STEINER
Assistant District Attorneys
Of Counsel

January, 1984